Administrative Law Judge Decisions

12-07-83	Cynthia Coal Co., Inc.	KENT 83-116
12-07-83	Webster County Coal Corp.	KENT 83-216
12-07-83	Ray Ward v. Volunteer Mining Corp.	SE 82-55-D
12-07-83	Brown Brothers Sand Company	SE 83-42-M
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12-12-83	Glen Munsey v. Smitty Baker Coal Co.	NORT 71-96
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12-14-83	U.S. Steel Mining Co., Inc.	PENN 82-306
12-14-83	U.S. Steel Mining Co., Inc.	PENN 83-221
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12-15-83	Albert J. Dicaro v. U.S. Fuel Company	WEST 82-113-D
12-16-83	Billy K. Deel v. D.O.W. Coal Co.	VA 82-62-D
12-19-83	Southwestern Illinois Coal Corp.	LAKE 80-216
12-20-83	MSHA/M.Hogan & R.Ventura v. Emerald Mines	PENN 83-141-D
12-21-83	Kitt Energy Corporation	WEVA 82-363
12-21-83	Westmoreland Coal Company	WEVA 83-237
12-22-83	U.S. Steel Mining Co., Inc.	PENN 83-89
12-22-83	Vulcan Materials Co. SE Division	SE 84-7-M
12-22-83	MSHA/Robt.Roland v. Oil Shale Constructors	WEST 83-90-DM
12-23-83	J.D. Mosley v. D.F.J. Coal Co., Inc.	KENT 84-15-D
12-27-83	Kaiser Steel Corporation	WEST 80-79
12-28-83	United States Steel Mining Co.	PENN 82-218
12-28-83	Monterey Coal Company	HOPE 79-323-P

COMMISSION DECISIONS

Secretary of Labor, MSHA v. Turner Brothers, Inc., Docket No. CENT 83-12
(Judge Moore, November 22, 1983)

There were no cases in which review was Denied during the month of December

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 79-31
SEWELL COAL COMPANY	:	

DECISION

This case requires us to examine further the relationship between modification and enforcement proceedings under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V. 1981). We hav previously addressed the propriety of raising the issue of diminution of safety for the first time as a defense in an enforcement proceeding. Penn Allegh Coal Co., 3 FMSHRC 1392 (June 1981). In this case, which is before us a second time, we must examine the effect in an enforcement proceeding of findings concerning diminution of safety made by the Secretar of Labor in a modification proceeding. For the reasons that follow, we hol that under the circumstances of this case the findings in the modification proceeding are binding in the enforcement proceeding.

On January 15, 1976, Sewell Coal Company was issued a notice of violation under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977), by a representative of the Secretary of the Interior. The notice of violation charged Sewell with operating a Galis 300 roof bolter without a canopy in violation of 30 C.F.R. § 75.1710-1. Prosecution of the case was continu by the Secretary of Labor after the Mine Act was enacted. The parties agre that under the terms of the standard a canopy was required. The day before the notice of violation was issued, however, Sewell had filed s petition fo a modification of the canopy standard with respect to the roof bolter. 1/ Sewell asserted in its petition that installation of a canopy would diminis the safety of its miners.

1/ Sewell filed its modification petition under section 301(c) of the 196 Coal Act. 30 U.S.C. § 861(c)(1976)(amended 1977). This provision was repl by section 101(c) of the 1977 Mine Act, 30 U.S.C. § 811(c) (Supp. V 1981), which states in part:

> Upon petition by the operator or the representative of miners the Secretary may modify the application of any mandatory

the basis that there was no violation because the standard was "null, v unenforceable." Sewell Coal Co., 1 FMSHRC 1379 (September 1979)(ALJ).

We granted the Secretary's petition for review, reversed the judge's finding that the standard was invalid, and remanded the case. Sewell Coal Co., 3 FMSHRC 1402 (June 1981). We noted that, although a modification decision had been issued, the judge had provided "no clear discussion of the interrelationship between the factual matters at issu in [the] enforcement proceeding and those at issue in the modification case." 3 FMSHRC at 1414-15. Moreover, the judge's decision had not discussed the legal effect, if any, of the granted modification on the pending enforcement proceeding. We therefore remanded the matter to afford the parties an opportunity to present arguments concerning the effect of the modification on the civil penalty case. 3 FMSHRC at 1415

On remand, the parties again agreed to settle the matter and moved for the judge's approval. The judge issued an extensive order to show cause why the motion should not be denied and the matter dismissed. Sewell Coal Co., 3 FMSHRC 2578 (November 1981)(ALJ). The judge stated that it was more probable than not that when Sewell was issued the notice of violation it could not have installed a canopy on the roof bolter without diminishing safety. The judge expressed his tentative conclusion that an affirmative defense of diminution of safety was therefore available to Sewell, and ordered the parties to "present arguments addressing the issue of the availability of the defense of diminution of safety." 3 FMSHRC at 2590.

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footnote 1 cont'd.

> safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the results of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such a mine. [Emphasis added].

Section 101(c) preserves the same bases for granting a variance that we contained in section 301(c) of the 1969 Coal Act. Under the modificati provisions of the Mine Act, the decision to grant or withhold a varianc is made by the Secretary of Labor. The MSHA regulations implementing section 101(c) provide for an initial decision by an Administrator of M with a right of appeal ultimately to the Assistant Secretary of Labor f Mine Safety and Health. 30 C.F.R. §§ 44.13-44.33. Sewell's modificati

he Secretary argued that the judge could not, in effect, overrule the dministrator's decision. Sewell responded that for the reasons stated the judge, the settlement should be denied and the matter dismissed.

The judge again rejected the settlement. He held that he had roperly raised the issue of diminution of safety, and concluded that he defense had been established. In response to the Secretary's as- ertion that he was attempting to overrule the Administrator's finding s to whether compliance diminished safety, the judge asserted: "[E]vi- ence in this record which was not before the Administrator established hat, independent of the Administrator's decision, sufficient practical echnology did not exist on the date of the alleged violation to warrant mposition of an obligation to install canopies." 3 FMSHRC at 2579 footnote omitted). Accordingly, the judge dismissed the case. FMSHRC at 2580. We then granted the Secretary's petition for iscretionary review.

We first consider whether an operator may raise a diminution of safety efense in an enforcement proceeding where it has already received a modifi- ation decision with respect to the same condition at issue in the enforce- ent case. The phrase "diminution of safety" in section 101(c) of the Mine ct (n. 1, supra) serves as one of the following two bases for a determina- ion by the Secretary that an operator may depart from otherwise mandated ompliance with a standard: (1) if an alternative method of achieving the esults of the standard exists with no loss in the measure of protection fforded to the miners by the standard; or (2) if application of the stan- ard to the mine will diminish the safety of the miners.

The reasons for providing for such departures in these circumstances e obvious. As to the first, modification provides a degree of operating lexibility while accomplishing the same level of miner protection. As to he second, Congress found "an urgent need to provide more effective means nd measures for improving the working conditions and practices in the ation's ... mines in order to prevent death and serious physical harm." 0 U.S.C. § 801(c). The key means for accomplishing this legislative goal s establishing a basic level of safety through statutory interim mandatory afety standards and requiring the Secretary to raise that level through the omulgation of improved standards. 30 U.S.C. § 801(g)(1). Where, due to a ine's particular circumstances, compliance with a mandatory standard would ave an effect opposite to that intended -- that is, where adherence to a tandard would reduce miner safety -- logic dictates and Congress provided he modification procedures.

compliance with a mandatory standard. Id. Cf. General Electric Co. v. Secretary of Labor, 576 F.2d 558, 561 (3d Cir. 1978). 2/ The present case, however, concerns an operator that filed a modification petition prior to being cited and received a final modification decision from the Secretary prior to the administrative law judge's hearing in the enforcement proceeding. Cf. Florence Mining Co., 5 FMSHRC 189 (February 1983), pet. for review filed, No. 83-3134, 3d Cir., March 15, 1983. We conclude that where, as here, an operator has applied for and received a modification on the grounds of diminution of safety, recognition of a narrow diminution of safety defense in a subsequently filed enforcement action is necessary to effectuate the purposes of the Mine Act and, properly applied, is compatible with its statutory scheme.

Consequently, we hold that an operator may argue diminution of safety as a defense to the Secretary's allegation of a violation and request for imposition of a penalty under the following circumstances: (1) the operator petitioned for the modification of a standard and was subsequently cited fo violating the standard; (2) the Secretary granted the modification but nonetheless continued the enforcement proceedings; and (3) the material circumstances encompassing the modification and the enforcement proceedings are identical. Therefore, where the operator's petition for modification has been granted by the Secretary, introduction of the modification decisio and an unrebutted showing that the underlying conditions at issue in the enforcement proceeding are identical with those upon which the modification decision is based will establish a complete defense. If the defense is established, we will not find a violation or assess a penalty. For us to do so would be at odds with the Act's goal of assuring an improved level of safety because, under these circumstances, we would be penalizing the operator for having avoided a hazard to miners.

2/ We realize that emergency situations may arise where the gravity of circumstances and presence of danger may require an immediate response by the operator or its employees, necessitating a departure from the terms of a mandatory standard without first resorting to the Act's modification procedures. In such conditions, an exception to the Act's modification and liability provisions may be necessary in order to further the Act's primary goal, the protection of miners. Penn Allegh did not present such a situati nor does this case. Rather, these cases involve only the operator's abilit to conduct safely routine mining operations on a continuing and regular bas Therefore, we reserve for a case appropriately raising such an issue detail consideration of any emergency exception to the general rules on modificati and liability.

ative and judicial remedies concerning the denial. Also, if the odification was denied but the circumstances have changed and the operator elieves compliance will diminish safety, it should again seek a modificatio rom the Secretary rather than ask the Commission in an enforcement proceedi o vacate a citation. Similarly, if the Secretary granted a modification nd subsequently cited the operator, he may refute a proffered diminution f safety by showing that the cited conditions are different from those ncompassed by the modification decision.

In this case, we will consider Sewell's diminution of safety defense ecause Sewell instituted a proceeding to modify the standard prior to eing cited for the violation and received a final decision in that roceeding granting the petition for heights at or less than 48 inches. 3/ us, we turn to the question of whether Sewell's defense should be upheld.

We first reject the Secretary's assertion that the issue of diminution f safety was waived because it was not pleaded initially by Sewell. We emanded this matter for the express purpose of consideration of "the legal ffect of the grant of a modification petition [upon] a pending enforcement roceeding." Sewell's modification petition to which we referred was based oon an assertion of diminution of safety. Sewell Coal Co., 3 FMSHRC at 141 he question of whether a failure to plead an affirmative defense constitute waiver must be decided on a case-by-case basis. A crucial consideration whether the opposing party has been deprived of notice of the issue and us has been hindered in its ability to prepare for and to participate in rial. We detect no lack of fair notice here. Not only did we put the ecretary on notice, but the judge also, in his order to show cause, set orth fully his views on the subject and gave the Secretary sixteen days o "present arguments addressing ... the availability of the defense of iminution of safety in this case." Sewell Coal Co., 3 FMSHRC at 2586-90.

We also reject the Secretary's assertion that the judge improperly aised the issue of diminution of safety sua sponte. In previous cases we ave found that our judges, when reviewing a settlement, may examine the ndamental question of whether there is in fact a violation. Co-op Mining o., 2 FMSHRC 3475, 3475-76 (December 1980); Olga Coal Co., 2 FMSHRC 2669, 70 (October 1980). The Mine Act requires us to oversee penalty settlement a means of encouraging compliance. 30 U.S.C. § 820(k). Paying a penalty here there has been no violation does not promote that goal. Co-op Mining o., 2 FMSHRC at 3476. Here the judge properly raised the question to termine whether the violation could stand. The thrust of our inquiry herefore is whether he correctly found it could not.

This case does not present the situation where an enforcement pro-

violation was cited at a mining height of 50 inches, the standard would appear to be inapplicable, the judge found that compliance at even 50 inches would diminish safety.

The judge, as we have noted, referred to "evidence in [the] record, whic was not before the Administrator." Sewell Coal Co., 3 FMSHRC at 2579. This evidence appears to be the Secretary's representation in his first motion to approve settlement that "in some instances the use of canopies on the Galis drills had caused injuries to employees" and that when the violation was cite technology to abate it was in the experimental stage. 3 FMSHRC at 2579 n.1. The judge also relied on the fact that the original notice of violation, whic referred to a mining height of 55 inches, was subsequently amended to show a minimum mining height on the section of 50 inches. Id. Finally, the judge noted his own "accumulated expertise." 3 FMSHRC at 2587-88.

We find no evidence in this record that leads us to conclude that the Administrator's finding with respect to diminution of safety should not apply. The Administrator's decision and the contested citation concern the same mine, the same section in that mine, and the same equipment. The Secretary and Sewell agree that the mining height was 50 inches. 5/ The facts upon which the Administrator based his findings are set forth in his decision: the mined height of the section, the condition of the roof and floor, and the clearance between the frame of the roof bolting machine and the bottom of the roof supports. Sewell Coal Co., No. M76-131 (April 27, 1979), at 5. As we have indicated, if Sewell believes that these conditions have changed so that compliance at heights above 48 inches diminishes safety, Sewell should petition the Secretary for modification.

Finally, to the extent the judge relied on the statement in the first settlement motion that when the notice was issued "technology was in the experimental stage," we note that the Secretary's second motion on behalf of the parties expands upon this assertion and maintains that canopies were

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4/ In the second settlement motion, the Secretary stated that "canopies were available from the manufacturer of the Galis 300 roof bolter at the time [the violation was cited], but many operators were dissatisfied with this design and were seeking other alternatives or modifications to the design to improve its capabilities." Request for Settlement Approval, August 20, 1981, p. 1.

5/ The original citation stated the height on the section averaged 55 inches. The citation was subsequently modified by the inspector to state that the minimum mining height on the section was 50 inches. Sewell does not contest the accuracy of this modification. In its brief, Sewell states that the inspector modified the original citation

ettlement. 6/

Ordinarily, we would remand to the judge for further consideration of th
ettlement motion. However, because the contested notice of violation was
ssued over seven years ago, and in view of the fact that the case has been
efore the judge twice and is now before us for a second time, we deem it tim
o end the controversy. Cf. Eastover Mining Co., 4 FMSHRC 1207, 1214 (July
982). A penalty has been proposed for the violation. We have reviewed the
ecord in light of the statutory penalty criteria (30 U.S.C. § 820(i)), and
ind the proposed penalty appropriate in light of all the circumstances.
ccordingly, the parties' second motion for approval of the settlement,
greeing to the proposed $25.00 penalty, is granted.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

6/ This result corresponds with that reached by the judge concerning the
ther violation that was originally at issue in this case. The Secretary
lso sought a penalty for a violation of 30 C.F.R. § 75.1710-1(a) with
espect to a shuttle car, which was operating without a canopy at a mining
eight of 43 inches. As in the case of the roof bolter, the operator had
etitioned for a modification with respect to the shuttle car prior to being
ited for the violation. In the modification decision, the Administrator
oncluded that installation of a canopy on the shuttle car in mining heights
48 inches or below would diminish safety. Sewell Coal Co., M76-131
April 27, 1979), at 14. The judge held that, based upon these facts and
he Administrator's conclusion, the defense of diminution of safety was
stablished. 3 FMSHRC at 2579. The Secretary did not seek review of this
ortion of the decision.

to be permitted to ignore mandatory standards. (Slip op., p. 4 n.2). Although--perhaps--dicta, the danger inherent in encouraging claims of emergency "exception(s)" to the clear mandate of the statute, including section 101(c) thereof, neither assures an "improved level of safety" (slip op., p. 4) nor, without strict adherence to the requirements necessary to establish the narrow defense of diminution of safety, "... guarantee[s] no less than the same measure of protection afforded the miners ... by such standard ...." 30 U.S.C. § 811(c).

A. E. Lawson

A. E. Lawson, Commissioner

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Administrative Law Judge Joseph Kennedy
Federal Mine Safety & Health Review Commission
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December 8, 1983

OSALIE EDWARDS :
:
v. : Docket No. WEST 80-441-DM
:
ARON MINING, INC. :

DECISION

This discrimination case arises under section 105(c)(3) of the ederal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et eq. (1976 & Supp. V 1981). At issue is whether the failure to provide ore suitable toilet facilities at the mine site, which failure led to e miner's resignation, constituted retaliatory action in response to epeated requests and complaints by the miner concerning existing acilities. The administrative law judge concluded that the operator ad constructively discharged the miner in violation of the Mine Act. salie Edwards v. Aaron Mining, Inc., 3 FMSHRC 2630 (November 1981) ALJ). On review, the operator challenges the judge's finding of dis- rimination. For the reasons that follow, we reverse.

The facts are largely undisputed. The complaining miner, Rosalie dwards, worked at Aaron Mining, Inc., as an assayer of gold samples rom January 21, 1980 through about March 15, 1980. At the time that e accepted employment with Aaron there were no indoor or permanent oilet facilities on the mine site. Edwards had not inquired about such acilities when she was hired, but during her tenure she requested ilet facilities in every daily safety report she submitted, as well as n conversations with Aaron supervisory personnel.

The only toilet facility on the mine site was an outhouse located out three-quarters of a mile from the lab in which Edwards worked. Aaron had attempted to drill for water for permanent facilities, but ts repeated efforts in this regard had been unsuccessful.) In order to ach the outhouse an employee of Aaron had to travel a single-lane road which visibility was poor. The employee then had to climb under a rbed-wired fence and walk about a half a block down a hill to reach he outhouse. Edwards described the sanitary conditions in the outhouse s appalling and used the facility only once. In response to he om-

and 70-minute round trip) to use the bathroom there. Aaron knew of the trips, did not object to her going, did not dock her pay for the time lo and, on two occasions, gave her gasoline for her car. After making this round trip for several weeks, Edwards told Aaron supervisory personnel t it was "very inconvenient" to go home daily.

Edwards' last working day was Friday, March 15, 1980. On either March 16 or 17, 1980, Edwards resigned. She did so by going to the home of Aaron's general manager, where she complained once more about the lack of permanent or indoor toilets. She also gave him a letter stating that she was willing to return when Aaron had a water supply for permane toilet facilities, and if Aaron increased her salary. The general manag offered to meet her salary demand, but Edwards refused to stay. 1/

On April 7, 1980, Edwards wrote to the Department of Labor's Mine Safety and Health Administration (MSHA) alleging discrimination under the Mine Act because of Aaron's failure to provide suitable toilet facilities. The Secretary of Labor investigated her complaint, found no violation of the Act, and declined to proceed on her behalf. On August 21, 1980, pursuant to section 105(c)(3) of the Mine Act, Edwards filed a complsint of discrimination with this independent Commission. 30 U.S.C. § 815(c)(3).

After the hearing, the Commission's administrative law judge conclu that Edwards' complaints about the lack of required sanitary facilities protected activity, and that Edwards was constructively discharged by th operator while engaging in that activity. He based his conclusion of constructive discharge on a finding that Edwards' only reasonable altern to working under unsafe and unhealthful conditions was to quit. In his view, her resignation under these facts was equivalent to being discharg 3 FMSHRC at 2633. We granted the operator's petition for discretionary review of the judge's decision.

Under the Mine Act, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he or she engaged in protected activity and that the adverse action complained of was motivat in any part by that activity. William A. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-37 (November 1982); Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d

1/ Sometime in March 1980, Edwards filed a claim for unemployment co pen a i n wit th ate of Nevada. Aaron evidentl claimed there

The undisputed evidence shows that Edwards complained repeatedly, both orally and in writing, about what she reasonably believed were unhealthful conditions. The operator concedes that "restroom facilities at Aaron Mining were less than adequate." Therefore, we affirm the judge's conclusion that Edwards' complaints were protected and conclude that she established the first element of a prima facie case of discrimination.

We further conclude, however, that Edwards failed to establish the second element of a prima facie case, i.e., she did not show that there was adversa action by the operator motivated in any part by her safety complaints. Aaron did not take any retaliatory action. The operator did not fire, demote, transfer, or harass her. Even if Aaron's failure to provide the requested toilet facilities is viewed as an adverse action, we find no evidence that this failure was motivated in any way by Edwards' protected complaints. As we noted earlier, there were no permanent toilets when Edwards was hired. According to the substantial and uncontroverted evidence of record, Aaron unsuccessfully tried to drill for water for permanent facilities and to obtain portable facilities Further, Aaron accommodated Edwards by permitting her to leave the mine site daily for extended periods to travel to her house and, on two occasions, replaced gasoline consumed on those trips. There is no indication that Aaron tried to force Edwards to quit. To the contrary, the operator tried to persuade her to remain by offering to meet her demand for a salary increase. In our view, the record does not establish that Aaron's failure to remedy the condition complained of by Edwards was motivated in any part by Edwards' protected activity. Thus, under Mine Act discrimination analysis, the judge's finding of a violation cannot be upheld. 2/

Application of the principles of "constructive discharge" does not change the result. For the reasons just stated we find no evidence that Aaron created or maintained the existing toilet facilities because of the exercise by Edwards of any rights protected by the Mine Act. No proof of an impermissible motive having been shown, a constructive discharge in violation of the Act is not established. Cf. NLRB v. Haberman Constr. Co. 641 F.2d 351, 358 (5th Cir. 1981)(en banc). Accord, Cartwright Hardware v. NLRB, 600 F.2d 268, 270-71 (10th Cir. 1979); J.P. Stevens and Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972); Montgomery Ward v. NLRB, 377 F.2d 452, 458-459 (6th Cir. 1967); see BNA 2 The Developing Labor Law 210-11 (2d ed. 1983). Thus, we hold that Aaron's failure to provide toilet facilities, and Edwards' resulting quit, do not constitute discrimination in violation of section 105(c).

violation of 30 C.F.R. § 56.20-8, a mandatory health standard, existe
Thus, through the procedure available under section 103(g)(1), Edward
could have obtained an MSHA inspection of Aaron's toilet facilities.
Had the Secretary's representative found those facilities to be in
violation, he could have utilized the full array of available statuto
enforcement powers, including the issuance of citations and withdrawa
orders and the proposed assessment of penalties. Here, Edwards did n
set this statutory scheme in motion, but rather took the personal rec
of resigning her job. 4/

Accordingly, we reverse the judge's finding of discrimination, vacate his award of back pay, interest, and incidental expenses, and vacate his assessment of penalty.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissio

A. E. Lawson, Commissioner

3/ 30 C.F.R. § 56.20-8 provides:

> Mandatory. Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel. The facilities ahall be kept clean and sanitary. Separate toilet facilities shall be provided for each sex where toilet rooma will be occupied by no more than one person at a time and can be locked from the inside.

4/ Edwards testified that at the time of her resignation, she was n
aware of the relevant mandatory standard, 30 C.F.R. § 56.20-8. Howev
there is no indication that she was unaware of MSHA's responsibility
inspecting mines. Indeed, she was sufficiently aware of MSHA's respo
bilities to contact that agency about the alleged discrimination two
after her resignation.

on work refusal. Pratt v. River Hurricane Coal Company, 5 FMSHRC 1529 1533 (September 29, 1983) and cases cited therein.

Frank E. Jestrab, Commissioner

in its holding that Rosalie Edwards was not discharged, or in any way discriminated against, in violation of section 105(c) of the Mine Act. 30 U.S.C. §815(c). Nevertheless, I believe that under the facts of this case the majority opinion may be read by some as arriving at an overly harsh result. In my view, such a reading would be incorrect. Certainly the factual recitation elicits considerable sympathy for Rosalie Edwards; in any event, the Commission must decide cases on the bases of the law and the facts -- not on the basis of sympathy or empathy. Were it otherwise, the result in this case with good reason might be different. Thus, despite the absence of adequate toilet facilities at the mine (prior to and during the tenure of Rosalie Edward a case of unlawful discrimination was not established here and under the statute the operator must prevail.

L. Clair Nelson

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SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
On behalf of MILTON BAILEY	:	Docket No. CENT 81-13-D
	:	
v.	:	
	:	
ARKANSAS-CARBONA COMPANY	:	
	:	
and	:	
	:	
MICHAEL WALKER	:	

DECISION

This discrimination case presents four issues: whether the Commissio administrative law judge abused his discretion in severing the Secretary Labor's request for a civil penalty from the complaint of discrimination; whether the judge erred in awarding 6% interest on the back pay award; whether he erred in tolling the back pay award on the date the Secretary filed a complaint on Bailey's behalf; and whether he erred in refusing to award Bailey tuition and certain miscellaneous expenses.

president of one of the firms comprising the Arkansas-Carbona joint venture and after June 13, 1980, took over control of mine operations at the mine site. On June 27, 1980, Bailey complained to Walker that the mine's first aid kit, which had been moved from the main office to a screened porch, should remain in the office to prevent its exposure to dust. Walker contended the kit was in a dustproof container. An argument ensued which resulted in Bailey's discharge.

On October 20, 1980, the Secretary of Labor filed a discrimination complaint before this independent Commission on behalf of Bailey against Arkansas-Carbona and Michael Walker. 1/ His complaint alleged that Bailey unlawfully discharged for exercising rights protected by section 105(c)(1) the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The relief sought included back pay with 9% interest and reinstatement on the same shift with the same or equivalent duties at a rate of pay "presently proper" for the position. The Secretary's complaint also requested "an order assessing a civil penalty of not more than $10,000 against [the operator] for [the] violation of section 105(c) of the Act." 30 U.S.C. § 815(c)(Supp. V 1981). On January 22, 1981, the Secretary filed a motion to amend his discrimination complaint. The motion stated in part: "Subsequent to his filing of the complaint the Secretary was informed by complainant Bailey that he did not wish to be reinstated by respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses."

The Commission's administrative law judge first held that Bailey's complaint concerning the first aid kit on the day of his discharge was protected activity and that Bailey's discharge was motivated in part by that protected activity. Thus, the judge held that a prima facie case of discrimination, that is, adverse action motivated in part by protected activity, was proved. 3 FMSHRC 2313, 2318-19 (October 1981)(ALJ). The judge then examined each non-discriminatory ground the operator presented as the cause of Bailey's termination and concluded, "Neither singularly nor in combination do Respondents' contentions establish that Respondents would have discharged Complainant for the reasons given." 3 FMSHRC at 2319. Therefore, the judge determined that Arkansas-Carbona's discharge of Bailey violated section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1).

The judge awarded Bailey back pay with 6% interest from the date of discharge until October 19, 1980, one day before the Secretary's complaint was filed. 3 FMSHRC at 2323. Because the complaint on behalf of Bailey was amended January 22, 1981, to request one year's college tuition and related expenses in lieu of reinstatement, the judge applied

In addition, the judge severed MSHA's proposed assessment of a civil penalty from this proceeding, and he ordered MSHA to proceed under Commission Procedural Rule 25, 29 C.F.R. § 2700.25. 3/ At the outset of the administrative hearing, the judge explained the reason for the severance: "I will sever the civil penalty proceeding because there has not been the required administrative processing of the proposal through the notification to the respondents of the amount of the proposed penalty or the opportunity to discuss this matter with the District Manager's office." Tr. 4.

II. Severance of the civil penalty from the proceedings involving the complaint of discrimination

We first consider the question of how civil penalties for violations of section 105(c) should be proposed and assessed in cases where the Secretary files a complaint on behalf of a miner, and then whether the judge erred in severing the penalty proceeding.

Civil penalties are assessed under the Mine Act to induce compliance with the Act and its standards. See, for example, S. Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977) ("S. Rep."), reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978) ("Legis. Hist."). Penalties are mandatory for violations of

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2/ Rule 15(c), Fed. R. Civ. P., provides in part:

> Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

3/ Commission Procedural Rule 25 provides:

> The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) the violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty. If within 30 days from the receipt of the Secretary's notification or proposed assessment of penalty, the operator or other person fails to notify the Secretary that he intends to contest the proposed penalty, the Secretary's proposed penalty shall be deemed to be a final order of the Commission and shall not be subject to review by the Commission or a court.

3 FMSHRC 1895, 1896-98 (August 1981). 4/

This bifurcation of functions is set forth in sections 105 and 11 the Act. 30 U.S.C. §§ 815 & 820 (Supp. V 1981). Section 105(a) requi Secretary to take certain steps to notify an operator of the civil pen "proposed to be assessed under section 110(a) for the violation cited. 30 U.S.C. § 815(a). Section 110(a) provides, in turn, for penalty ass of not more than $10,000 per violation. 30 U.S.C. § 820(a). Section provides, "The Commission shall have authority to assess all civil pen provided in this Act." 30 U.S.C. § 820(i). After listing the six sta penalty criteria, section 110(i) concludes, "In proposing civil penalt this Act, the Secretary may rely upon a summary review of the informat available to him and shall not be required to make findings of fact co the above [six] factors." 5/

Section 105(a) states that the civil penalty proposal procedures for the Secretary therein are only invoked "[i]f, after an inspection investigation, the Secretary issues a citation or order under section [30 U.S.C. § 814]." 30 U.S.C. § 815(a). 6/ The Secretary must notify operator "within a reasonable time" of the penalty he proposes. If th operator chooses to contest a proposed penalty, the Secretary must "immediately advise" the Commission so that a hearing can be scheduled 30 U.S.C. § 815(d). The statutory procedures for prompt notification

4/ When penalties proposed by the Secretary are not contested, howev a proposed civil penalty is not actually assessed but is deemed to be final order of the Commission, as if the Commission had assessed it. 30 U.S.C. § 815(a). See also Commission Procedural Rule 25 (n. 3 supr

5/ The words "shall be assessed a civil penalty by the Secretary" in section 110(a) must be read in pari materia with sections 105(a) and 110(i). Although section 110(a) uses the language "shall be assessed civil penalty by the Secretary," the express language of sections 105(and 110(i) makes clear that this Secretarial function is one of propos not disposition. The legislative history bears out this reading of section 110(a). Conf. Rep. No. 461, 95th Cong., 1st Sess. 58 (1977) reprinted in Legis. Hist. 1336; S. Rep. 43, 45-46, reprinted in Legis. Hist. 631, 633-34. Thus, the reference to "shall be assessed" in section 110(a) means "shall be subject to a proposed assessment of a civil penalty by the Secretary." See Sellersburg Stone Co., supra.

6/ Section 104, 30 U.S.C. § 814 (Supp. V 1981), contains the procedu through which an operator's violations of the Act or its standards are enforced. Section 104(a) makes clear that citations shall be issued f violations of "this Ac , or any mandatory

are not initiated with the issuance of a citation or order under sect 104 but, rather, with filing of special complaints before the Commiss under sections 105(c)(2) or 105(c)(3). 30 U.S.C. §§ 815(c)(2) & (3). These two statutory subsections provide for complaint by the Secretar if he believes discrimination has occurred, or complaint by the miner if the Secretary declines to prosecute.

It is clear that a penalty is to be assessed for discrimination violation of section 105(c)(1). The last sentence of section 105(c)(states, "Violations by any person of paragraph (1) shall be subject t the provisions of sections 108 [30 U.S.C. § 818] and section 110(a)." 30 U.S.C. § 815(c)(3). 7/ Section 110(a) requires the Secretary to propose penalties to be assessed for violations of the Act. Neither section 105(c) nor section 110(a), however, states how and when the Secretary is to propose a penalty for a violation of section 105(c)(1

The Secretary's regulations in 30 C.F.R. Part 100 set forth "cri and procedures for the proposed assessment of civil penalties under s 105 and 110 of the [Mine Act]." 30 C.F.R. § 100.1. 8/ Section 100.5 a number of "categories [of violations which] will be individually re to determine whether a special assessment is appropriate" including "discrimination violations under section 105(c) of the Act." 9/

In spite of this reference to discrimination cases, none of the regulations specifies how the Secretary shall propose a civil penalty files the complaint of discrimination, and it does not appear that th Secretary contemplated that his administrative review procedures for posed penalties should apply to a determination that an operator had

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7/ Section 108 permits injunctive relief and is not relevant to the issues presented in this case.

8/ In this analysis, for convenience, we will refer to the current Part 100 regulations, which became effective May 21, 1982. They are substantially similar to those in effect when the judge's decision issued. The changes made do not affect our analysis, and we would reach the same conclusions under either version.

9/ A review of the discrimination cases adjudicated by this Commia- sion indicates that the Secretary has used the section 100.5 special assessment procedure in discrimination cases only when the miner has proceeded on his own behalf pursuant to section 105(c)(3) of the Act and prevailed, or when, as here, the judge has severed the penalty proceedings from the discrimination case. In other discrimination cases, the Secretary has requested a penalt in its complaint of

The Secretary argues that the penalty proposal procedures in section 105(a) of the Mine Act and Commission Procedural Rule 25 apply only to citations and orders issued under section 104. Violations of the discrimination section, the Secretary urges, are subject only to the provisions expressly mentioned in section 105(c) itself. The Secretary relies on the last sentence in section 105(c)(3), which states that violations of section 105(c)(1) "shall be subject to the provisions of sections 108 [injunctions] and 110(a)." 30 U.S.C. § 815(c)(3). He argues that because section 110(a) contains no reference to section 104 or to section 105(a), the assessment proposal procedures required therein need not be applied in penalty proposals under section 105(c)(3).

Thus, from the language of sections 105(c)(3) and 110(a), the Secretar argues that it is not necesaary to have separate penalty proceedings in discrimination cases. Rather, he contends that penalties should be assesse by Commission judges when liability is determined--that is, when an operato is found in a discrimination proceeding to have violated section 105. The Secretary asserts he is "always" prepared to provide the information on the penalty criteria in section 110(i), and that an administrative law judge wi never be more competent to decide the penalty question than at the close of a discrimination case in which the judge has determined the existence of a violation.

10/ Commission Procedural Rules 40 through 44 (29 C.F.R. §§ 2700.40 through 44) deal with discrimination complaints, but do not resolve the issue of how a penalty is to be proposed. Rule 42 requires that a discrimination complaint include, among other things, "a statement of the relief requested." The rule tracks section 105(c)(2) of the Act, which requires the Secretary in his complaint to "propose an order granting appropriate relief." 30 U.S.C. § 815(c)(2). The Secretary contends that a civil penalty is part of the "relief" he may request in the complaint, and that inclusion of such a request in a complaint conforms to Rule 42 and section 105(c)(2). We conclude, however, that "relief" as used in section 105(c) and Rule 42 indicates only those remedies available to make the discriminatee whole. Section 105(c)(3) states in part, "The Commission shall ... issue an order ... granting ... relief ... including ... rehiring or reinstatement ... with backpay and interest or such remedy as may be appropriate." 30 U.S.C. § 815(c)(3). The legislative history also supports this reading of "relief." See Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142 (February 1982), citing to S. Rep. 37, reprinted in Legis. Hist. 625. A civil penalty, on the other hand, is not intended to compensate the victim but rather to deter the operator's future

under section 110(a), we conclude that penalty proposals for section 105(violations are to be expedited as well. The express statutory intent to expedite these proceedings is furthered by having the Secretary avoid dua proceedings and incorporate his penalty proposal in his discrimination complaint.

We also conclude, however, that it is incumbent upon the Secretary i combined proceeding to set forth in the discrimination complaint the prec amount of the proposed penalty with appropriate allegations concerning th statutory criteria supporting the proposed amount. Experience makes us somewhat skeptical about the Secretary's assertion that he has "always" b prepared to present evidence on penalty criteria. Formal penalty allegat in the complaint better afford operators adequate notice of penalty issue discrimination cases. Because the Secretary may "rely on a summary revie the information available to him" in proposing penalties (30 U.S.C. § 820 the penalty allegations in the discrimination complaint may be stated in fashion.

In this case, the Secretary's naked request in his complaint for a p of "up to $10,000" is scarcely a penalty proposal at all. Henceforth, we require in these cases that the Secretary propose in his complaint a pena a specific dollar amount supported by information on the section 110(i) c for assessing a penalty. This new rule shall apply to cases pending with judges as of the date of this decision or filed with the Commission as of after, the date of this decision. Leave to amend complaints to add the p allegations shall be freely granted. Thus, the operator will be informed only of the dollar amount proposed, but also the basis therefor. The par will then be better prepared to litigate at the hearing any disputes conc the penalty sought.

Because the Secretary did not provide in his complaint sufficient no to the operator of the amount of the penalty sought and the basis therefo cannot say that the judge erred in severing the penalty proposal in order provide such notice to the operator. Nor do we see the utility of a rema to allow the Secretary to amend his complaint. The judge's approach to t Secretary's inadequate proposal is consistent with the Act's notice requi ments and with the position we now enunciate. Accordingly, we affirm the judge's severance of the penalty proposal from the underlying discriminat complaint. 11/

11/ We are presently in the process of adopting an interim amended Rule which will reflect our resolution of the penalty issue. We also note tha this cas does not raise, and we do not reach, the question of how penalt

Estle v. Northern Coal Co., 4 FMSHRC at 142. As we have previously obser "'Unless compelling reasons point to the contrary, the full measure of re should be granted to [an improperly] discharged employee.'" Secretary or behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982), quoting Goldberg v. Bama Mfg. Corp., 302 F.2d 152, 156 (5th Cir. 1962).

Included in that "full measure of relief" is interest on an award of back pay. Section 105(c)(3) of the Mine Act expressly includes interest in the relief that can be awarded to discriminatees, while leaving it up to the discretion of the Commission to determine the exact contours of such an award. 12/ The Senate Committee that drafted the section which became section 105(c) stated in its report:

> It is the Committee's intention that the Secretary propose, and the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination.

S. Rep. 37, reprinted in Legis. Hist. 625 (emphasis added).

Our judges have awarded interest at rates varying from 6% per annum to 12.5% per annum and have used a variety of methods to compute interest awards. At least two of our judges have adopted the NLRB's rate of interest on back pay awards. See, e.g., Bradley v. Belva Coal Co., 3 FMSHRC 921, 925 (April 1981)(ALJ) aff'd in part, remanded in part on other grounds, 4 FMSHRC 982 (June 1982); Secretary on behalf of Smith et v. Stafford Construction Co., 3 FMSHRC 2177, 2199 (September 1981)(ALJ) a in part, rev'd in part on other grounds, 5 FMSHRC 618 (April 1983), pet. review filed, No. 83-1566, D.C. Cir., May 27, 1983. The experience of ou

12/ Section 105(c)(3) provides in part:

> The Commission ... shall issue an order, ... if the charges [of discrimination] are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.

The miner has not only lost money when he or she has not been paid in violation of section 105(c), but has also lost the use of the money. As the NLRB has stated with regard to interest on back pay awards under the National Labor Relations Act, "The purpose of interest is to compensate the discrimin for the loss of the use of his or her money." Florida Steel Corp., 231 NLRB 651, 651 (1977). Thus, in selecting an interest rate, we have considered th potential cost to the miner both as a "creditor" of the operator, and as a potential borrower from a lending institution under real economic conditions We have therefore sought a rate of interest that compensates the discriminat fully for the loss of the use of money. In addition, we have attempted to select a rate of interest flexible enough to reflect economic and market realities, but not so complex in application as to place an undue burden on the parties and our judges when attempting to implement it.

For all of these reasons we adopt the interest rate formula used by the NLRB: interest set at the "adjusted prime rate" announced semi-annually by t Internal Revenue Service under 26 U.S.C.A. § 6621 (West Supp. 1983) as the interest it applies on underpayments or overpayments of tax. The "adjusted prime rate" of the IRS is the average predominant prime rate quoted by commercial banks to larger businesses as determined by the Federal Reserve Board and rounded to the nearest full percent. 26 U.S.C.A. § 6621 (West Supp. 1983). Under the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, § 345, 96 Stat. 636 (to be codified at 26 U.S.C. § 6621), the adjusted prime rate must be established semi-annually: by October 15 based on the prime rates from April 1 to September 30, and by April 15 based on the prime rates from October 1 to March 31. The rate announced in October becomes effective the following January 1, and the rate announced in April becomes effective the following July 1.

We agree with the NLRB that the IRS adjusted prime rate comes closest to compensating the miner fully for loss of the use of money. On the one hand, if the miner had the money, he or she could invest it or save it and probably earn less than the prime rate. On the other hand, if the miner has to borrow money because he or she is deprived of a paycheck, the rate of interest most likely would be higher than the prime rate. In these circumstances, we concur with the NLRB that the IRS formula "achieves a rough balance between that aspect of remedial interest which attempts to compensate the discriminatee or charging party as a creditor and that which attempts to compensate for his loss as a borrower." Olympic Medical Corp., 250 NLRB 146, 147 (1980). This "rough balance" in our view achieves the goa of making the miner whole for the loss of the use of money.

The IRS adjusted prime rate is also attractive for pragmatic reasons. It is a per annum rate adjusted semi-annually based on the prime rates for

January 1, 1984 to June 30, 1984.....11% per year (.0003055% per

Because the IRS rates of interest are announced as annual rates, it is necessary, as explained below, to convert them to daily rates to calculate interest on periods of less than one year. 13/

There must also be a uniform method of computing the interest on back pay awards under the Mine Act. We have considered a number of possible computational approaches. We are mindful of the NLRB's extensive administrative and legal experience in this area. The NLRB's general back pay methodology is sound and has met with judicial approva The labor bar is familiar with this system. We conclude that rather than expending administrative resources in attempting to devise a new system, we will best, and most efficiently, effectuate the remedial goals of section 105(c) of the Mine Act by adopting the major features of the NLRB computational system. We are satisfied that this system will do justice to the miner, avoid unnecessary penalization of the operator, and not prove unduly burdensome for our judges and bar to apply.

We therefore announce the following general rules for the computation of interest on back pay.

Back pay and interest shall be computed by the "quarterly" method. See Florida Steel Corp., 231 NLRB at 652; F.W. Woolworth Co., 90 NLRB 2 (1950), approved NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). 14

13/ Prior to the passage of the Tax Equity and Fiscal Responsibility Act of 1982, the IRS announced the adjusted prime rate in the October of the appropriate year to take effect the following February. For eas of administration under the Mine Act, however, we have bounded certain interest periods at December 31 and January 1 rather than at January 31 and February 1. (The NLRB's General Counsel has followed the same simplifying approach. NLRB Memorandum GC 83-17, August 8, 1983.)

14/ Back pay is the amount equal to the gross pay the miner would have earned from the operator but for the discrimination, less his actual interim earnings. Bradley v. Belva Coal Co., 4 FMSHRC 982, 994-95 (Jun 1982). The first figure, the gross pay the miner would have earned, is termed "gross back pay." The third figure, the differenee resulting fr subtraction of actual interim earning from gross back pay, is "net back pay"--the amount actually owing the discriminatee. Interest is awarded on net back pay only.

quarter, the gross back pay, the actual interim earnings, if any, and the net back pay are determined. See n. 14.

Interest on the net back pay of each quarter is assessed at the adjusted prime interest rate or rates in effect, as explained below. Like the NLRB, we will assess only simple interest in order to avoid the additional complexity of compounding interest. Interest on the amount of net back pay due and owing for each quarter involved in the back pay period accrues beginning with the last day of that quarter and continuing until the date of payment. See Florida Steel Corp., 231 NLRB at 652. In calculating the amount of interest on any given quarte net back pay, the adjusted prime interest rates may vary between the la day of the quarter and the date of payment. If so, the respective rate in effect for any quarter or combination of quarters must be applied fo the period in which they were operative. The interest amounts thus acc for each quarter's net back pay are then summed to yield the total Inte award.

For administrative convenience, we will compute interest on the ba of a 360-day year, 90-day quarter, and 30-day month. Using these simpl values, the amount of interest to be assessed on each quarter's net bac is calculated according to the following formula:

> Amount of interest = The quarter's net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x daily adjusted prime rate interest factor.

The "daily adjusted prime rate interest factor" is derived by dividing the annual adjusted prime rate in effect by 360 days. For example, the daily interest factor for the present adjusted prime rate of 11% is

each quarter involved in the back pay period is as follows:

First quarter (beginning January 1, 1983)	$1,000
Second quarter (beginning April 1, 1983)	$1,000
Third quarter (beginning July 1, 1983)	$1,000
Total net back pay	$3,000

The adjusted prime interest rates in effect in 1983 are:

16% per year (.0004444% per day) from January 1, 1983, to June 30, 1983;
11% per year (.0003055% per day) from July 1, 1983, to December 31, 1983.

The interest award on the net back pay of each of these quarters is as

(1) First Quarter:

(a) At 16% interest until end of second quarter of 1983:
$1,000 net back pay x 91 accrued days of interest (last day of first quarter plus the entire second quarter) x .0004444 = $40.44

Plus,

(b) At 11% interest for entire third quarter through the date of payment:
$1,000 net back pay x 105 accrued days of interest (t third quarter plus 15 days) x .0003055 = $32.07

(c) Total interest award on first quarter:
$40.44 + $32.07 = $72.51

(2) Second Quarter

(a) At 16% interest for the last day of the second quarter
$1,000 x 1 accrued day of interest x .0004444 = $.44

Plus,

(b) At 11% interest for the entire third quarter through da:e of payment:
$1,000 x 105 accrued days of interest x .0003055 = $32.07

(c) Total = $.44 + $32.07 = $32.51

(3) Third Quarter:

At 11% interest for the last day of the third quarter through date of payment:
$1,000 x 16 accrued days of interest x .0003055 = $4.88 totsl

(4) Total Interest Award:

desirability of adjustment.

In discrimination cases, our judges should advise the parties of the methodology for calculating back pay and interest. The parties shall submit to the judge the requisite back pay figures and calculations, and are urged to make as much use of stipulation as possible. The burden of computation of interest on back pay awards should be placed primarily on the parties to the case, not the judge, in order to comport with the adversarial system.

We apply the foregoing principles in this proceeding because the issue of the appropriate rate of interest in discrimination cases arising under the Mine Act was squarely raised on review. As a matter of discretionary policy in judicial administration, we will otherwise apply these principles only prospectively to discrimination cases pending before our judges as of the date of this decision or filed with the Commission as of, or after, the date of this decision. We do not mean to intimate that any previous awards of interest by our judges in other cases, based on different computational methods, are infirm.

Applying our formula to the present case, we conclude that reversal is necessary. The judge's award of 6% interest is so disparate from the adjusted prime rates in effect from the date of Bailey's discharge on June 27, 1980, as to raise questions concerning whether the complainant would truly be made "whole" if the judge's award stands. Accordingly, we hold that the judge erred in awarding 6% interest, and will remand for recalculation of interest pursuant to the interest formula and computational methods approved in this case.

IV. Tolling of the back pay award

The judge concluded that Bailey was not entitled to back pay after October 20, 1980, the date on which Bailey's complaint was filed. That complaint requested reinstatement, but it was amended January 22, 1981. The amended complaint sought back pay and requested the Commission to "order respondents to pay Mr. Bailey $900.00 for one year college tuition plus $400.00 book and maintenance expense allowance in lieu of reinstatement at respondents' mine." The accompanying motion to amend stated:

> Subsequent to his filing of the complaint the Secretary was informed by complainant Bailey that he did not wish to be reinstated by respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses.

on October 20, 1980. Rule 15(c) provides that where a claim or defens in an amended pleading arises out of the same circumstances set forth in the original pleading, the amendment relates back to the date of the original pleading. Relation back has been generally permitted where the movant seeks to enlarge the basis or extent of a demand for relief. See, for example, Goodman v. Poland, 395 F. Supp. 660, 682-86 (D. Md. 1975)(change of theory of recovery from equity to law permitted); Wisbey v. Amer. Community Stores Corp., 288 F. Supp. 728, 730-32 (D. Neb. 1968)(amendment seeking additional damages in FLSA action permitted We do not believe that the restrictive application of relation back by the judge was appropriate in this case.

Rather, in determining when back pay should terminate, we look to t date when Bailey informed the Secretary he no longer sought reinstatemen at Arkansas-Carbona. We agree with the judge's related conclusion: "It would be unfair and improper to require a mine operator to pay a former employee back pay for a period of time when the employee has unequivocal stated that he does not want to return to his former employment." 3 FMS at 2321. In a case involving similar issues, this judge compared a mine lack of desire to be reinstated to a rejection of an offer of reinstatem under the National Labor Relations Act. Secretary on behalf of Ball v. B&B Mining, 3 FMSHRC 2371, 2378 (October 1981)(ALJ). We concur with the NLRB rule that an employer is released from his back pay obligations whe the employee rejects an appropriate offer of reinstatement, and consider the analogy to the facts of this case appropriate. See, for example NLR Huntington Hospital, 550 F.2d 921, 924 (4th Cir. 1977); NLRB v. Winchest Electronics, Inc., 295 F.2d 288, 292 (2d Cir. 1961); Lyman Steel Co., 24 NLRB 712 (1979).

Tolling the back pay award on the date Bailey informed the Secretar that he no longer desired reinstatement effectuates the preceding princi while the judge's relation back to the original complaint needlessly and unfairly penalizes Bailey. Therefore, we reverse the judge's relation b to the date of the original pleading. The present record does not reve the date Bailey informed the Secretary of his waiver of reinstatement. Accordingly, we additionally remand for determination of that date in or that the back pay period may be established and the necessary computatio properly made.

V. College tuition and related expenses.

Bailey's remaining contention concerning the award is that the judg erred in not granting him tuition and miscellaneous college expenses. judge held, "Complainant failed to establish any entitlement to an award

Arkansas-Carbona, and resigned from his campus job, he paid his own tui

The remedial goal of section 105(c) of the Act is to return the mi to the status quo before the illegal discrimination. Secretary on beha of Dunmire and Estle v. Northern Coal, 4 FMSHRC at 142. Had Bailey not discharged illegally, he would have been working at Arkansas-Carbona an would have had to pay tuition for his classes. We do not see how Arkan Carbona can be held responsible for a fringe benefit Bailey did not rec from that company. Although at times we may need to seek alternative remedies to make a miner whole for illegal discrimination (for example, where reinstatement is impossible or impractical), such considerations not present in this case.

Accordingly, we affirm the judge's refusal to award tuition and college expenses.

VI. Conclusi

For the foregoing reasons, we affirm the judge's severing of the request for a civil penalty from the merits of the discrimination case, and hold that in future cases the Secretary must propose in his discrimination complaints a specific penalty supported by allegations relevant to the statutory penalty criteria. As we have stated above, we are accordingly in the process of amending our Procedural Rule 42 to provide for unif'ed proceedings in the future.

We reverse e judge's assessment of 6% interest on back pay, and to the Chief Administrative Law Judge for assignment to a judge for cal tion of back pay and interest a rding to the principles and methodolo announced in this decision. 17/ e reverse the judge's tolling of the

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank P. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 83-116 A.C. No. 15-12725-03502
v.	:	No. 8 Mine
CYNTHIA COAL CO., INC., Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solic
U.S. Department of Labor, Nashville, Tenness
for Petitioner;
Byron W. Terry, Safety Director, Cynthia Coa
Company, Beaver Dam, Kentucky, for Responden

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petit against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(seeking a civil penalty assessment in the amount of $20 for an alleged violation of mandatory health standard 30 CFR 71.208(a) as noted in a Section 104(a) Citation No. 99 served on the respondent by an MSHA inspector on August 12

The respondent contested the citation, and the case w scheduled for a hearing in Evansville, Indiana, along with several other cases during the term November 1-3, 1983. However, respondent's counsel decided not to pursue the ma and agreed to pay the full amount of the proposed civil pe assessment. In this regard, petitioner's counsel presente a proposed settlement on the record for my consideration.

Discussion

In support of the proposed settlement disposition of this case petitioner's counsel agreed that the respondent

counsel was of the opinion that the proposed settlement constituted a reasonable resolution of the case.

After careful consideration and review of the pleadi and the arguments presented by the petitioner's counsel i support of the proposed settlement of this case I find that it is reasonable and in the public interest, and pursuant to Commission Rule 30, 29 CFR 2700.30 it is APPR

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $20 within thirty (30) days of the date of this decision, and upon receipt of payment by MSHA this matter dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Darryl A. Stewart, Esq., U.S. Department of Labor, Office of the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Byron W. Terry, Safety Director, Cynthia Coal Co., Inc., P.O. Box 431, Beaver Dam, KY 42320 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN
	:	Docket No. KENT 83-216
	:	A.C. No. 15-00672-03508
v.	:	Retiki Mine
WEBSTER COUNTY COAL CORP., Respondent	:	Docket No. KENT 83-259
	:	A.C. No. 15-02132-03513
	:	Dotiki Mine

DECISIONS

Appearances: Darryl A. Stewart, Esq., Office of the Solic
U.S. Department of Labor, Nashville, Tenness
for Petitioner;
Nick Carter, Esq., MAPCO, Inc., Lexington, K
for Respondent.

Before: Judge Koutras

Statement of the Cases

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respon pursuant to Section 110(a) of the Federal Mine Safety and Act of 1977, 30 CFR 820(a), seeking civil penalty assessme for two alleged violations of mandatory health standard 30 70.100(a).

The respondent contested the citations, and pursuant to notice the cases were docketed for hearings in Evansvil Indiana during the term November 1-3, 1983. These cases w scheduled for trial on November 3, 1983. However, prior t commencement of the hearings, respondent's counsel advised me that the respondent had decided not to litigate the cas further and counsel sought leave to dispose of the cases b tendering full payment of MSHA's proposed civil penalties. Under the circumstances, the parties were afforded an opportunity to present their proposals on the record, and

assessments, and the proposed settlements are as follows:

Docket KENT 83-216

Citation No.	Date	30 CFR Section	Assessment
9949525	1/24/83	70.100(a)	$227

Docket KENT 83-259

Citation No.	Date	30 CFR Section	Assessment
2075782	3/3/83	70.100(a)	$213

Discussion

The parties stipulated to the following:

1. At all times pertinent to these proceedi
Webster County Coal Corporation, was owner a
operator of the Dotiki Mine in Webster Count
Kentucky, and the Retiki Mine in Henderson
County, Kentucky, and the mines are subject
the Federal Mine Safety and Health Act of 19

2. The presiding Administrative Law Judge h
jurisdiction to hear and decide these cases.

3. The inspectors who issued the citations
are the subject of these proceedings are des
authorized representatives of the Secretary
Labor.

4. True and correct copies of the citations
were served upon the operator.

5. The copies of the citations (Exhibits G-
through G-2) are authentic copies and may be
admitted as such, but not for the truth or
relevance of the statements made therein.

6. Payment of the penalties assessed in the
proceedings will have no effect on the opera
ability to continue in business.

In support of the proposed settlement disposition of these cases, petitioner's counsel asserted that after consi of the statutory criteria found in Section 110(i) of the Ac as well as his consultation with the inspectors who issued the citations, he was of the view that the respondent's payment in full of the proposed penalty settlements is a reasonable disposition of these dockets and that the propos settlements are in the public interest. Counsel also present a computer print-out summarizing the respondent's history o prior citations.

After careful consideration and review of the pleading filed in these cases, including the arguments submitted on the record in support of the proposed settlement dispositio by the parties, I find that they are reasonable and in the interest, and pursuant to Commission Rule 30, 29 CFR 2700.3 they are APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above within thirty (30) days of the date of these decisions, and upon receipt of payment by MSHA, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Darryl A. Stewart, Esq., U.S. Department of Labor, Office o the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville TN 37203 (Certified Mail)

Nick Carter, Esq., MAPCO, Inc., 181 N. Mill St., #9, Lexing KY 40507 (Certified Mail)

RAY WARD,
Complainant : Docket No. SE 82-55-D

v. : BARB CD 81-38

VOLUNTEER MINING CORPORATION,
Respondent :

FINAL ORDER

Before: Judge Fauver

My decision on liability was entered on July 29, 1983, holding that Respondent discriminated against Complainant in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., and granting leave to the parties to propose an order of relief.

On December 1, 1983, the parties filed a settlement agreement on relief. This agreement is APPROVED as a just and appropriate settlement consistent with the decision on liability and the purposes of the Act.

WHEREFORE IT IS ORDERED that this proceeding is CONCLUDED

William Fauver
Administrative Law Judge

Distribution:

Dorothy B. Stulberg, Esq., Mostoller and Stulberg, 100 Tulsa Road at Illinois Avenue, Oak Ridge, Tennessee 37830 (Certified Mail)

Joseph H. Van Hook, Esq., Drawer M., Oliver Springs, Tennessee 37840 (Certified Mail)

CRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 83-42-M
Petitioner	:	A.C. No. 09-00265-05501
v.	:	
	:	Junction City Mine
OWN BROTHERS SAND COMPANY,	:	
Respondent	:	

DECISION

pearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Carl W. Brown and Steve Brown, for Respondent.

ore: Judge Broderick

ATEMENT OF THE CASE

This case involves a single citation charging Respondent th a violation of 30 C.F.R. § 50.30(a) for failing to file arterly man-hour reports for the third and fourth quarters of 82. Pursuant to notice, the case was heard in Talbotton, orgia, on November 15, 1983. Ronald Grabner, a federal mine fety and health inspector testified for Petitioner. No nesses were called by Respondent. The parties made oral guments on the record but each waived its right to file written sthearing briefs. Based on the entire record, and considering e contentions of the parties, I make the following decision.

NDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent s the owner and operator of a sand dredging operation in bot County, Georgia, known as the Junction City Mine.

2. Respondent is a small family owned business. It employed proximately nine employees at the time of the violation alleged rein.

5. Respondent did not file the quarterly man-hour repo for the third and fourth quarters of 1982, prior to March 15 1983, when the citation involved herein was issued.

6. The citation was terminated on the day it was issue when the reports in question were filled out and submitted.

7. Respondent has not filed the quarterly man-hour rep for any of the first three quarters of 1983.

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Fede Mine Safety and Health Act of 1977 and the regulations promu thereunder in the operation of the Junction City Mine.

2. Respondent's failure to submit quarterly employment reports for the third and fourth quarters of 1982 is a viola of 30 C.F.R. § 50.30.

DISCUSSION

Respondent does not deny that he failed to submit the r in question. He apparently challenges the necessity and val the reports. Clearly, however, the reports are legitimate r ments of the Secretary who is charged with the responsibilit promoting health and safety in the nation's mines. Preparir statistical analyses of injury rates and injury causes is an integral part of that responsibility. The fact that Respond thinks the reports are onerous or unnecessary is no defense petition for a penalty for a violation.

3. The violation was in itself not serious, since the failure or refusal to file the required reports is not likel result in injury or occupational disease.

4. The violation was deliberate.

DISCUSSION

A citation was issued on June 26, 1980, to the Responde charging it with failure to file the quarterly man-hour repo

Therefore, I believe that respondent had prior notice of the requirements of the regulation in question, and while his subsequent failure to file borders on gross negligence, I have considered the fact that respondent may have been confused as to what was required and find that the citation in question here resulted from respondent's failure to exercise a reasonable care amounting to ordinary negligence.

the case before me, there is no question that Respondent was are of the filing requirements and its failure to observe them. I stated above, Respondent apparently believes the requirement be onerous and unnecessary. In fact the reporting requirement simple to observe, and it has a legitimate public purpose. rl Brown's statements on the record exhibited a contemptuous titude toward the requirement. No mine operator, whether Brown thers Sand Company or United States Steel Company, may decide r itself whether it will observe the duly promulgated standards e penalty assessed in this case will reflect my conclusion that e violation was deliberate.

5. Respondent did not exhibit good faith in abating the olation after the citation was issued. Although the citation s abated, it was done so grudgingly, and the violation has parently been repeated since then. The penalty assessed in is case will reflect my conclusion that Respondent did not nibit good faith in complying with the regulation after the tation was issued.

6. Considering the criteria in section 110(i) of the Act, conclude that an appropriate penalty for the violation found $100.

ORDER

Based on the above findings of fact and conclusions of law, IS ORDERED that Respondent shall within 30 days of the date this decision pay the sum of $100 for the violation found rein to have occurred.

/James A Broderick

Mr. Carl W. Brown, Brown Brothers Sand Company, P.O. Box 32, Howard, GA 31039 (Certified Mail)

December 12, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN
	:	Docket No. CENT 83-61-M
	:	A.C. No. 23-00113-0550
v.	:	
	:	Webb City Chat Plant
INDEPENDENT GRAVEL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The parties have filed a motion to approve settlement in the above-captioned proceeding. The original assessmen for the one violation was $54. The proposed settlement is $27.

Citation No. 2095336 was issued for a violation of 30 C.F.R. § 56.5-1/5 because the South Mill operator was exposed to an excessive level of respirable silica-bearing dust. The parties advise that the gravity of the violatio is not as severe as originally was rated. The parties adv that overexposure to silica-bearing dust for short periods will not result in permanent disability. This may be so, but exposure over long periods is a serious matter, and each individual exposure adds to the total. I view this as a violation with gravity. I approve the recommended settlement because the operator is small in size and has a small history of prior violations. In the future, the operator should exercise care over the dust levels.

ORDER

The operator is ORDERED to pay $27 within 30 days fro the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. CENT A.C. No. 34-013
v.	:	
TURNER BROTHERS, INC., Respondent	:	Docket No. CENT A.C. No. 34-013
	:	Heavener No. 1

DECISION

Appearances: Allen Reid Tilson, Esq., Office of the U.S. Department of Labor, Dallas, Texa Petitioner;
Robert J. Petrick, Esq., Turner Brothe Muskogee, Oklahoma, for Respondent.

Before: Judge Melick

Hearings were held in these cases on October 27, Fort Smith, Arkansas. A bench decision was thereafte and essentially only the amount of penalties have bee That decision, as modified herein, is now affirmed.

Waiver of Right to Presence at Hearing

As a preliminary matter, I find that Turner Brothers, Inc., has waived its right to be prese at this hearing today and to cross examine witne es and present evidence on its own behalf. It i clear that the operator received adequate notice well in advance of hearing. It is also clear fr the last minute telephone calls made late yester day by the operator's representative and receive by the Solicitor and by my office after I had al ready departed for this hearing, that the operat did not request and did not want a continuance o this hearing.

Indeed, the telephone calls to the Solici- tor's Office and to my office were to the effect

been proposed initially by the Secretary could be modified by the Administrative Law Judge and indeed could be increased as well as decreased after hearing the evidence in the case. Accordingly, I find that the operator has waived its right to be present and to participate at this hearing.

The Merits

These cases are, of course, before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, which I will refer to hereafter as the "Act". The Secretary, in the petitions filed, is seeking civil penalties for seven violations of regulatory standards.

The general issues before me are whether the operator, that is, Turner Brothers, Inc., which I will refer to hereafter as "Turner", has committed the violations charged and, if so, the amount of civil penalty to be assessed. In determining the amount of civil penalty to be assessed I must, of course, independently oonsider the criteria under Section 110(i) of the Act. This is a de novo determination and I am not bound in any way by the proposed assessment or findings previously made by the Secretary pursuant to his own regulations. Section 110(i) requires consideration of the operator's history of previous violations, the appropriateness of any penalty assessed to the size of the business of the operator charged, whether the operator was negligent, the effect of the penalty on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

According to MSHA Inspector Donalee Boatright, the mine in this case had an annual coal production of about 350,000 tons and had 51 employees. Total annual production at all of Turner's mines was about one million tons. The mine and

out of prior violations. This print-out shows a minimal history of violations and does not show any violations of standards cited in the particular cases before me. There is no evidence that the operator would be unable to pay the penalties that I impose in this case or that they would affect its ability to stay in business. It appears, moreover, that the violations in this case were abated in a timely fashion and in good faith.

Now, proceeding to the individual citations, I consider first of all Docket No. CENT 83-13, Citation No. 2007396. The citation reads as follows: "An unplanned ignition of explosives occurred at this mine sometime in late August of 1982, and the mine operator did not notify MSHA of the accident. The operator did not have a report of his investigation of the accident at the mine office, so the exact date in August could not be determined. The accident occurred when an unexpected electrical storm came up and ignited 16 charged holes while the employees were being removed from the blasting area. No injuries occurred."

The citation charges a violation of the standard at 30 CFR Section 50.10. That standard states as follows: "If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582."

The evidence before me is that Inspector Boatright received information from his supervisor on December 6, 1981, concerning an explosion at the Heavener No. 1 Mine, operated and owned by Turner. Inspector Boatright thereupon went to the mine and talked to the mine superintendent, Jim Payne. Mr. Payne at first denied that there had been any ignition of explosives or any other accident but upon further inquiry admitted that

The incident in question involved a premature detonation by an electrical storm of a number of charged holes. It appears that a number of the drilled holes, each approximately 50 feet deep and five inches in diameter, had been fully charged, i.e., explosives had been placed to within approximately eight feet of the surface. Each of the charged holes had also been provided with a detonator and wires were protruding from the holes in preparation for final wiring for detonation. At this time an electrical storm passed through the area setting off a number of the holes depicted in Petitioner's Exhibit No. 2, causing explosions to within approximately 88 feet of an individual who was operating the high wall drill. Indeed, there were charged holes to within 22 feet of the driller operator, and if these holes had also detonated, he could very well have been killed.

The evidence shows that the miners in the vicinity of the charged holes had previously withdrawn from the site upon the approach of an electrical storm, but had prematurely returned after some 35 minutes on the belief that the storm had passed. Apparently no citation was issued for the incident itself, but only for the failure to report it. Now the operator would no doubt contend, as it appears from the Answer filed in the case, that he looks upon this violation as non-serious -- a mere failure to file some paperwork. I look upon the violation somewhat more seriously. Here there was an accident of a particularly serious nature. Without a sufficient deterrent penalty, it would be too easy for the operator to avoid a Mine Safety and Health Administration inspection and investigation of such incidents and it would just be too simple for the operator to cover up his misdeeds. Moreover, without the impetus of MSHA, it would be too easy for an operator to fail to take corrective action to avoid future accidents of a similar nature. This could very well lead to future fatalities and serious injuries. I therefore find that there must be a stronger disincentive than a mere $10 or $20 penalty for the

MSHA in this regard. Under the circumstances, I believe a penalty of $175.00 is appropriate.

The second violation relating to this incident appears in Citation No. 2007397. That citation charges and the evidence shows that the mine operator did not have a report of his investigation of the unplanned explosion available for MSHA examination. The cited standard, 30 CFR Section 50.11(b), requires that such investigation must be completed by the operator after each accident at the mine and a copy must be submitted upon request to MSHA. The standard also sets forth the specifics that must be included in any such report. While the Mine Superintendent alleged that he had sent such a report to the mine office, apparently no such report was produced. Under the circumstances there is some question as to whether the proper report had indeed been completed. Accordingly, I find that a penalty of $175.00 is appropriate for the violation.

Moving now to the citations in Docket No. CENT 83-9, Citation No. 2007386 alleges a violation of the standard at 30 CFR Section 77.208(d). It reads as follows: "[f]ive compressed gas cylinders (1 acetylene, and 4 oxygen) were not secured in a safe manner in that they were laying on the ground near the cylinder storage rack near the mine office."

The standard cited reads as follows: "[c]ompressed and liquid gas cylinders shall be secured in a safe manner."

According to the undisputed testimony of Inspector Boatright, upon the initiation of his regular inspection of the Heavener Mine No. 1, on November 1, 1982, and in fact as he was leaving the mine office after making his initial contact with the superintendent, he observed five compressed gas cylinders lying on the ground in front of the mine office. The cylinders were within vie of an one entering or

cylinder could act like an uncontrolled rocket. The cylinders weighed approximately 70 to 80 pounds and could kill a person under those circumstances. Superintendent Payne explained that the cylinders had apparently been left by the delivery man earlier that morning, or the mechanic. I find that the superintendent should have seen the cylinders lying exposed on the ground right outside of his office, and that he was therefore negligent in failing to have them secured in a timely fashion. Under the circumstances, I find that the violation warrants a penalty of $175.00.

Citation No. 2227387 charges a violation of the standard at 30 CFR Section 77.1605(b), and alleges in particular that the Caterpillar rock haulage truck No. 915, operating at Pit 001-0 was not equipped with a parking brake in operating condition.

The cited standard requires that mobile equipment shall be equipped with adequate brakes and all trucks and front end loaders shall also be equipped with parking brakes. It is implicit in that standard that when the equipment is equipped with parking brakes, that the brakes must also be in operating condition.

It is undisputed in this case from the testimony of Inspector Boatright that the cited haulage truck did not have an operating parking brake. As pointed out by the inspector, ordinarily these trucks are not parked in areas where there would be an incline but are parked on level ground. However, there could very well be occasions where the truck might break down and have to be stopped and parked. Indeed, without an adequate parking brake, the truck could roll out of control and strike another vehicle or pedestrians in the area, and of course cause fatalities or serious injuries.

The superintendent stated that the brakes were checked as a matter of routine each morning

a.m. that morning. While it is possible that the parking brake did become defective during that short period of time, I do not find the explanation to be credible. Accordingly, I find that a penalty of $175.00 is appropriate for this violation.

Citation No. 2007388 charges a violation of the standard at 30 CFR Section 77.1605(d). It appears from that citation that the same rock haulage truck that had a non-operating parking brake also did not have an operating audible warning device, i.e., a front horn.

The standard cited requires that mobile equipment shall be provided with audible warning devices. It is undisputed that this vehicle did not have a front horn, that is, an audible warning device, just as charged in the citation. The inspector pointed out that without such an audible warning device, the haulage truck could not warn other vehicles or pedestrians of its approach, and this indeed could foreseeably result in fatalities or serious injuries.

Again the equipment operator stated that when he had checked the equipment that morning before his shift at 7:00 a.m., all systems, presumably including the front horn, were in functioning condition. While again it is certainly possible that the horn as well as the parking brake could have become defective in the few hours between the beginning of the shift and the discovery of this defect by the inspector, I find the explanation to be lacking in credibility. Under the circumstances, I find that a penalty of $175.00 is appropriate for this violation.

Citation No. 2007389, charges another violation of the standard at 30 CFR Section 77.1605(b). It appears that the front end loader did not have an operating parking brake. As pointed out by the inspector, the hazard in this situation was similar to that involving the haulage truck. The machine operator in this

$175.00 is appropriate for the violation.

Citation No. 2007390, charges a violation of the standard at 30 CFR Section 48.29(a). In particular, the citation reads that "[t]raining certificates (MSHA Form 5000-23) for 14 employees were not available at the mine site for inspection. The mine superintendent (Jim Payne) stated that the 14 employees had been trained within the last year by Frank R. Pasteur."

The standard at Section 48.29(a) requires not only the individual miner's completion of MSHA approved training but also requires that training certificates for the miners who have completed the training must be available at the mine site for examination by MSHA, the miners, the miners' representatives, and State inspection agencies.

It turns out in this case that indeed the 14 miners for whom the certificates were not available at the mine office did, in fact, have the training but that apparently the contractor, Mr. Pasteur, had not forwarded the proper forms back to the mine office.

Under the circumstances, I find that only a nominal penalty of $20.00 is appropriate for that particular violation.

ORDER

In accordance with the Decision in this case, Turner Brothers, Inc., is hereby ordered to pay civil penalties in the amount of $970 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

447, Muskogee, OK 74401 (Certified mail)

nw

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 83-32
	:	A.C. No. 12-01890-03502
v.	:	
	:	Lengacher Mine No. 1
EARTH COAL COMPANY, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On April 26, 1983, the operator was ordered to send an answer to this Commission within 30 days or show good reason for the failure to do so. The order advised that failure to respond would result in default. No response was received despite receipt of the order. On June 28, 1983, an order of default was issued ordering the operator to pay $763.

On July 27, 1983, the operator filed a request for review of the order of default. By an order dated August 4, 1982, the Commission granted review and remanded the case to me to ascertain and evaluate the operator's reasons for failing to respond to the show cause order dated April 26, 1983. On August 9, 1983, the operator was ordered to furnish information within 45 days sufficient for me to evaluate the reason for its failure to respond to my show cause order. No response to the August 9, 1983 order was received despite receipt of the order. On October 13, 1983, the operator was ordered to furnish the necessary information within 45 days or show good reason for the failure to do so.

The operator has now responded to the order of October 13, 1983. The operator states that the cited mine is no longer operational and the operator does not wish to pursue this matter any further.

of this order and this case is hereby DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U. S. Dep
ment of Labor, 230 South Dearborn Street, 8th Floor, Ch
IL 60604 (Certified Mail)

Mr. Byron W. Terry, Safety Director, Earth Coal Company
Inc., P. O. Box 431, Beaver Dam, KY 42320 (Certified M

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 83-5
	:	A.C. No. 36-00856-03503
v.	:	
	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION

Appearances: Agnes Johnson-Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Joseph T. Kosek, Jr., Esq., Ebensburg, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to secti 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," for one violation of the regu tory standard at 30 CFR § 75.202. The general issue before me whether the Rushton Mining Company (Rushton) has violated the cited regulatory standard and, if so, whether that violation wa "significant and substantial" as defined in the Act and as inte preted by the Commission in Secretary v. Cement Division, Natio al Gypsum Company, 3 FMSHRC 822 (1981). If it is determined th a violation has occurred, it will also be necessary to determin the appropriate penalty to be assessed. Evidentiary hearings o these issues were held in Philipsburg, Pennsylvania.

On April 15, 1982, MSHA Inspector Donald Klemick issued a combined withdrawal order and citation under sections 107(a) an 104(a) of the Act, respectively. The validity of the order is not in itself at issue in this civil penalty proceeding. See Secretary v. Wolf Creek Collieries Company, PIKE 78-70-P (March 26, 1979); Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (October 1979). The Order/Citation alleged as follows:

sloughed in several areas and was [sic] on the mine floor, a heavy slate binder varying in width was present near the roof which would fall or had fallen when the ribs bump or roll-out, a violation of section 75.202.

The cited standard provides in relevant part that "[roof and overhanging or loose faces and ribs shall be tak or supported."

The expertise of MSHA Inspector Donald Klemick in mi ty is not disputed. He has twelve years experience as a mine inspector for MSHA, he conducts frequent underground mine inspections of roof and rib conditions and he has ha ic training in roof and rib control. Inspector Klemick a had six years experience as a coal mine owner and in that ty performed his own roof and rib examinations on a daily According to Klemick, the determination of the soundness and ribs in a coal mine is more of an art than a science. this regard, an important technique recognized in the min dustry for determining the safety of roof and ribs is kno "sounding". A "drummy" sound emitted from roof or ribs u ping by a wooden handled or other similar implement signa hollowness, separation, or fracturing that may not be vis These are indications of potentially dangerous roof or ri tions.

During the course of his regular inspection of the R Mine on April 15, 1982, Inspector Klemick observed that t were slabbing throughout the Number 13, 14, 15, 16, and 1 in the first left north mains, 013 section of the mine. per ten to eighteen inches of the rib consisted of a frac rock "binder" and "bony" coal which was overhanging up to inches in some places. There were about two hundred feet with such overhangs and some were visibly cracked and loc Many of the ribs also sounded "drummy", indicating a sepa fracture, and lack of adhesion in the ribs. More than ha the ribs had also sloughed in the area cited. According ick, some of this overhanging material can be seen in the graphic evidence (Operator's exhibits 0-1, 0-11, and 0-16

nger of death or great bodily harm existed.

There is no dispute that ribs in the cited area were protrud-
g from the vertical and that some were visibly fractured and
ummy sounding. Mine Superintendent Raymond Roeder accompanied
spector Klemick during this inspection and agreed with Klemick
at the ribs sounded drummy and that protrusions did exist in
me locations. Roeder does not, however, consider such "protru-
ons" to be "overhanging ribs" within the meaning of the cited
andard unless they protrude from the vertical more than six or
ght inches. Rushton's safety inspector, Robert Crain, also
reed that some of the ribs were fractured and produced a drummy
und. He also saw one protrusion of more than eight inches.

Within this framework of essentially undisputed evidence, it
clear that the violation is proven as charged. Ribs in the
ted area were clearly protruding from the vertical or "overhang-
g" and were admittedly loose and drummy in many locations.
ere was also a reasonable likelihood that the hazard of a rib
roof fall would occur under the circumstances, resulting in
ath or injuries of a serious nature. The violation was, accord-
gly, "significant and substantial" and of high gravity. Nation-
Gypsum, supra.

Klemick also concluded that the operator was negligent for
lowing the condition to exist. He observed that the operator
s required to perform three onshift and three preshift examina-
ons each day and that Mine Superintendent Roeder and the mine
reman, Mike Rapaski, concurred that the ribs were in fact loose
the cited area. The cited conditions were abated after the
erator provided additional roof and rib support by adding tim-
rs in some areas and by abandoning other areas.

The operator maintains that in spite of the described condi-
ons, the cited area was nevertheless a safe place to work. In
rticular, it points to the evidence that Inspector Klemick was
the cited mine section only two days before the withdrawal
der under essentially the same conditions and Klemick not only
iled to cite the conditions but did not see fit to even mention
em. It is not disputed that Klemick was indeed present in the
me mine section two days before, as alleged, but he claims not

there is no doubt that overhanging rib conditions did exist
detectable fractures, I do not find that the conditions wer
obvious as now alleged by MSHA. Accordingly, while I find
operator to have been negligent in allowing the cited condi
to exist, I do not find it to have been grossly negligent.

In determining the appropriate penalty to be assessed
this case, I have also taken into consideration the evidenc
in that the operator is medium in size and has a modest his
of prior violations. Under the circumstances, I find that
alty of $500 is appropriate.

ORDER

The Rushton Mining Company is hereby ordered to pay a
penalty of $500 within 30 days of the date of this decision

Gary Melick
Assistant Chief Administrative Law Judg

Distribution:

Agnes Johnson-Wilson, Esq., Office of the Solicitor, U.S.
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Philadelphia, PA 19104 (Certified mail)

Joseph T. Kosek, Jr., Esq., Rushton Mining Company, P.O. Bo
Ebensburg, PA 15931 (Certified mail)

N MUNSEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. NORT 71-96
	:	
TTY BAKER COAL CO, INC.,	:	IBMA 72-21
COAL COMPANY, and	:	
PH BAKER,	:	
Respondents	:	

DECISION

earances: Steven B. Jacobson, Esq., DeCastro, West & Chodorow, Inc., Los Angeles, California, for Complainant;
J. Edward Ingram, Esq., Robertson, Williams, Ingram, Faulkner & Overbey, Knoxville, Tennessee, for Respondents Smitty Baker Coal Company, Inc. and Ralph Baker.

ore: Judge Melick

This proceeding is before me on remand from the United tes Court of Appeals, District of Columbia Circuit, Munsey v. eral Mine Safety and Health Review Commission, 701 F.2d 976 83), cert. denied, 52 U.S.L.W. 3235 (October 3, 1983) (No. 82); for a determination in accordance with the standard set th in National Treasury Employees' Union v. U.S. Department of Treasury, 656 F.2d 848 (D.C. Cir. 1981), of the amount of ts and attorneys' fees to be awarded counsel for Complainant sey for the period during which Mr. Munsey received free repre tation by staff counsel of his union, the United Mine Workers America (UMWA).

There is no need to restate here the lengthy history of this e. In sum, the individual complainant, Glen Munsey, has been rded damages of $2,858.26 plus interest for lost wages as a lt of unlawful discrimination under section 110(b)(2) of the eral Coal Mine Health and Safety Act of 1969. In addition, services rendered by counsel for Mr. Munsey, Steven B. Jacob-, Esq., attorneys' fees of $26,462.50 and expenses of $335.16 e been awarded. Counsel is petitioning herein for additional of $42.0 0.00. No hearing has been requested on this m tter

UMWA staff attorneys, Charles P. Widman and Willard P
from the inception of the case until September 1976,
Mr. Jacobson (and a paralegal in Mr. Jacobson's law f
work done since the award of attorneys' fees by forme
Administrative Law Judge Forrest Stewart in his decis
September 4, 1981.

a. Attorney's fees for work performed by Mr. Jacobso
ployed by UMWA. Mr. Jacobson seeks fees totalling $3
this representation. The recognized method of comput
able attorneys' fees begins by multiplying a reasonab
rate by the number of hours reasonably expended. Hen
erhart, _____ U.S. _____, 76 L.Ed.2d 40, (1983); Cope
shall, 641 F.2d 880 (D.C. Cir. 1980). The resulting
been termed the "lodestar." The lodestar fee may the
ed to reflect a variety of other factors. Copeland,

Counsel for the Complainant submitted the follow
tion with respect to the hours spent representing Mr.
ing the period of time he was employed as staff attor
UMWA. The information was attached as Exhibit A to t
of Mr. Jacobson accompanying his current petition for
fees.

Preparation for and attendance at first 1973 D.C.
Circuit oral argument
Preparation for and attendance at second 1973 D.C.
Circuit oral argument

1973 - 36.75 hours at $50.00/hr. = $1,837.50

Preparation of Motion to Add P&P as a Respondent
Preparation of Motion to Add Ralph & Smitty Baker
as Respondents
Preparation of Report on Remand Procedures

1975 - 8.50 hours at $60.00/hour = $510.00

Preparation of exceptions and reply to opposing
exceptions to ALJ's decision

In his affidavit, counsel explained in connection with the oted activities that he maintained a contemporaneous record of ime spent on the instant case while he was a UMWA staff attorn he hours of work performed were noted on sheets of legal size aper kept in his desk or in the case file. "The task performe nd the hours spent on them on the day they were begun, were nc ed on the sheets the day they were begun. Hours spent on the ame task on subsequent days were noted as such. *** The hour ere totaled when each task was completed, and then were transf ed to handwritten summary sheets. The summary sheets showed a asks completed, and the total hours spent on each of them."

While it must be recognized that motivation for maintainir etailed and complete time records by a salaried staff attorney ho apparently was not required to do so by his employer may be omewhat lacking, I nevertheless find the submissions herein to e sufficient to permit a determination of reasonableness. Ac- ordingly, I find that said counsel reasonably expended 36.75 ours in 1973, 8.50 hours in 1975, and 22.25 hours in 1976. Mr acobson stated in his affidavit that based on conversations wi ttorneys at six law firms and court decisions awarding fees fo ork performed during that period, the fair market value of his ervices in the Washington, D. C. area was $50 per hour in 197 60 per hour in 1975, and $65 per hour in 1976. While Respon- ents, Smitty Baker Coal Company, Inc. and Ralph Baker, object he method of calculating fair market value of services based o omparable hourly rates as hearsay, they offer no contradictory vidence. Under the circumstances, I find that the rates repre ented by Mr. Jacobson are reasonable in the community for simi ar work and that those rates accurately reflect the value of t ime spent given the uncontested statement of counsel's back- round and expertise.

The number of hours reasonably expended by Mr. Jacobson mu iplied by reasonable hourly rates result in a lodestar figure or the period at issue of $3,793.75. No increase in that amou s warranted.

. Claim for attorney's fees for work by UMWA staff attorneys idman and Owens. Mr. Jacobson asserts a claim on his own beha or market-value attorneys' fees for UMWA staff attorneys Charl . Widman ($15,600.00) and Willard P. Owens ($8,625.00) on the rounds that when he left employment with the UMWA he reached a greement with that union to continue legal representation in

decision, however, the UMWA is not itself entitled to any cost fee allowance in cases of this nature for work perfo its salaried staff attorneys. The UMWA is limited to rec the expense to which it was put in supplying the legal se in question. National Treasury Employees' Union, supra, Accordingly the UMWA has no right to assign to Mr. Jacobs above-cost allowance of fees that might be awarded as a r work performed by other staff attorneys. At most the UMW assign only the recovery to which it would be legally ent i.e., recovery of the expense to which it was put in supp the legal services in question. No evidence has been pre in this case however concerning such expenses. Under the stances it is impossible to determine the UMWA interest t might be assignable to Mr. Jacobson.

Clearly, however, those staff attorneys could assign interest to Mr. Jacobson. Such an assignment of an above fee allowance in combination with the UMWA agreement with son would justify the payment of the fees to Mr. Jacobson there is no evidence before me, however, of any assignmen either of those former UMWA staff attorneys, payment of t fees to Mr. Jacobson must be contingent upon sufficient e of such an assignment. The final order in this case refl that contingency requirement.

The amount of fees requested on behalf of Widman and is challenged by Respondents because of the absence of co neous time records and a delineation of non-productive/un ful time. Messrs. Widman's and Owens' reconstructed time formulated by reference to the pleadings they prepared ar length of transcripts of the hearings they attended "reco that it takes a certain amount of time to prepare a compl locate and prepare witnesses, to otherwise prepare for tr etc.". In addition, apparently because his whereabouts w known, Mr. Owens' time was reconstructed without any inpu him.

I find that the lack of specificity and the absence temporaneous documentation and verification in the fee ap tion warrants a downward adjustment in the estimate of ho sonably expended. Copeland, supra. Accordingly, I find Widman's time should be reduced to 150 hours and that Mr. time should be reduced to 50 hours. Based upon the proff reasonable hourly rates of $75/hour and 100/hou respecti

subsequent to the decision of Judge Forrest Stewart on
3, 1981. This work was performed by Mr. Jacobson while
vate practice located in Los Angeles, California. Fee
tion is also made for work performed during this period
legal in Mr. Jacobson's law firm, Merna Figoten. The fe
tion (Exhibit A) discloses the following information:

a. Steven B. Jacobson

1. September 1981 - September 1982

Review and Analysis of ALJ's Decision
Preparation of Petition for Commission review
Prepare petition for D.C. Circuit review
Prepare Motion to Transfer Baker Appeal from Fourth Circuit to D.C. Circuit
Prepare Opposition to Motion to Transfer Munsey Appeal to Fourth Circuit
Preparation of Reply to Baker Opposition to Munsey Motion to Transfer
Prepare Motion for Leave to Intervene in Baker Appeal
Prepare Motion to Set D.C. Circuit Briefing Schedule
Prepare D.C. Circuit Brief and Appendix
Analyze Baker Brief and Prepare D.C. Circuit Reply Brie
Prepare Extension Motions
Court, Commission and Labor Department Correspondence
Client Correspondence
Total September 1981 - September 1982

83.00 hours at $115.00/hour = $9,545.00

2. October 1982 to Present

Prepare Opposition To Baker Motion To Strike
Preparation For and Attendance At D.C. Circuit Oral Argument
Review of D.C. Circuit Decision
Prepare D.C. Circuit Bill of Costs and Review of Opposition Thereto
Client Correspondence
Preparation of Petition for Attorney's Fees
Total October 1982 - Present Time

31.25 hours at 125.00/hour = $3,906.25

D.C. Circuit Briefs

9.50 hours at $60.00/hour = $570.00

Total September 1981 - September 1982 Paralegal Time $570

Exhibit B attached to the fee petition was represented to a copy of computerized time records maintained by Mr. Jacobson current law firm for work performed in this case subsequent to the September 3, 1981, decision. It is explained in the accom nying affidavit that it is the practice of attorneys and parale gals in this law firm to prepare handwritten time sheets of the work performed each day. The time sheets are then typed up and turned in to the computerized central billing facility on a dai basis. That facility prepares and keeps a running statement of all work performed on each matter in the law firm from its ince tion, and prepares periodic bills which are sent to clients. E hibit B is represented to be the portion of the running stateme for this case covering the period for which fees are sought. Both Mr. Jacobson's and Ms. Figoten's credentials are set forth in the affidavit accompanying the fee petition and are not dis- uted

Respondents object to the requested fees primarily on the grounds that the fees should be reasonable in relation to the results obtained. In particular, Respondents object to alleged non-productive/unsuccessful time for the period after September 1981. They note that the Petition for Commission Review raised five issues and that two of those issues involved reinstatement and two involved interest and increasing the "lodestar" fee dete mined by Judge Stewart. The Commission denied review of all fou of these issues and the Circuit Court affirmed that decision. Respondents further note that the fifth issue (allowance of fees during counsel's tenure with UMWA) represented only a small seg- ent of the Petition. They also point out that the appeal was successful on only that one issue in proceedings before the Cir- uit Court and was unsuccessful in any matter of benefit to Mr. unsey. Further objections are based upon alleged unnecessary rocedural matters and excessive time spent upon preparation of he second petition for attorneys' fees which duplicated in large art the earlier fee petition filed with Judge Stewart.

Certainly to the extent that there has been but limited ss in the review process

Mr. Jacobson stated that his billing rate was $115 per hour r work performed during the period September 1981 through Sep- mber 1982 and $125 per hour for work performed since October 82. According to the affidavit, these rates were based upon xhaustive surveys of rates charged by law firms in the Los Ang s area and are, if anything, somewhat low, given my experience d expertise." It is further represented that Ms. Figoten's lling rate was $60 per hour during the time she worked on this se. Ms. Figoten's billing rate "was likewise set after an ex- ustive survey of rates charged by Los Angeles law firms, and i kewise no greater than the average rate charged here." While ese rates are again challenged by Respondents as based upon arsay, they submit no contradictory evidence. Accordingly, I nd the rates quoted to be reasonable in the community for simi r work. I also find that the quoted rates accurately reflect e value of Mr. Jacobson's and Ms. Figoten's time, given their ckgrounds.

The number of hours reasonably expended by Mr. Jacobson dur g the period at issue multiplied by the corresponding hourly tes results in a lodestar figure of $5225.00. The number of urs reasonably expended by Ms. Figoten multiplied by the reasc le hourly rate result in a lodestar figure for the paralegal c 40.00.

While the overall attorney fee award in this case is more an seventeen times the damages awarded the actual victim of scrimination, it is well recognized that market value fee ards in cases such as this take into account the need to assur at miners with bona fide claims of discrimination are able to nd capable lawyers to represent them. In addition, the succes this case represents a vindication of societal interests incc rated in the mine safety legislation above and beyond the par- cular individual rights vindicated in the case. Accordingly I not find the substantial fee award in this case to be exces- ve or in the nature of a "windfall".

Order

Under prior decisions rendered in this matter, the Respon- nts, namely Ralph Baker, Smitty Baker Coal Company, and P&P

attorney's fees in the amount of $26,462.50 and expenses in th
amount of $335.16 to Steven Jacobson, Esq. In addition to pay
ment of the above amounts, it is further ordered that the Resp
dents, jointly and severally, pay (a) the additional amount of
attorneys' fees in the amount of $9,018.75 to Steven Jacobson,
Esq., and fees to the law firm of De Castro, West & Chodorow,
Inc. for the services of paralegal Merna Figoten in the amount
$240.00; and, (b) attorney's fees in the amount of $16,250.00
Steven Jacobson, Esq., upon presentation to Respondents and th
undersigned of an assignment to Mr. Jacobson of the respective
interests of Charles P. Widman, Esq., and Willard P. Owens, Es
in such attorneys' fees. Payment of amounts due must be made
within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Jud

Distribution:

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&P Coal Company, P.O. Box 219, Pennington Gap, VA 24277 (Cert
ied mail)

sw

UNITED MINE WORKERS OF AMERICA, LOCAL UNION NO. 1197, Complainant	:	DISCRIMINATION PROCEEDIN
v.	:	Docket No. PENN 83-234-D
BETHLEHEM MINES CORPORATION,	:	PITT CD 83-8
and	:	No. 60 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondents	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On September 23, 1983, a complaint was filed under sect 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the "Act"), alleging that Respondent Bethlehem has discriminated against Complainant and the mine represented by Complainant by utilizing a longwall mining machine in the subject mine which produces more than the lev of dust permitted under 30 U.S.C. § 842, and that Respondent MSHA has discriminated against Complainant and the miners re sented by Complainant by failing to enforce the dust standar in the statute and regulations against Bethlehem. The compl further alleges that the use by Bethlehem of the machinery c plained of, when it knew of MSHA's failure or refusal to enf the Act concerning the machinery "prevents [Complainant] fro exercising its statutory rights . . . in that if [Complainan its individual members were to refuse to work because of a hazardous condition created by the offending machinery, the employee asserting that right would be subject to discharge . . . ." As relief, Complainant seeks an order to withdraw machine from the mine or an order limiting the time miners a exposed to the resulting respirable dust.

On October 20, 1983, Respondent Bethlehem filed a motio Dismiss on the grounds that the complaint does not allege th Complainant (or its members) were engaged in activity protec by the Act and that adverse action was taken against them on

Opposition to the Motions to Dismiss and affidavits from two members of Complainant Local Union who work at the subject mine and are members of the Safety Committee.

ISSUES

1. Does the complaint state a cause of action under section 105(c) of the Act?

2. Is MSHA a "person" under section 105(c) and subject to its prohibition against discrimination?

3. Does the Commission have jurisdiction to grant the relief sought in the complaint?

THE STATUTE

Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

protected activity includes filing or making a complaint under the Act, instituting or testifying in a proceeding under the Ac requesting an inspection, accompanying an inspector as a miner' representative, receiving adequate training, and refusing to pe form work in conditions reasonably believed to be unsafe or unhealthful.

The complaint herein alleges that Bethlehem utilizes a lon wall mining machine which causes excessive concentrations of respirable dust and that MSHA has failed to enforce the dust standards in the Act and Regulations. Does this allege protect activity on the part of Complainant? The activity described in the complaint as protected is not the complaints made to Bethlehem or MSHA, but rather seems to be that Bethlehem contin to violate the dust standards and that MSHA refuses to enforce standards against Bethlehem. However, illegal and reprehensibl this alleged situation may be, by itself it can hardly be conve to the exercise by Complainant of rights protected by the Act. Complainant, as a representative of the miners, is given specia responsibility under the Act. Certainly, it has the right and duty to report unsafe or unhealthy mine conditions to MSHA, and is protected under 105(c) in making such reports. See UMWA Local 9800 v. Secretary and Dupree, 3 FMSHRC 958 (1981) (ALJ). However, that is not the activity alleged in this case. I conc that the complaint does not allege that Complainant was engaged activity protected under the Act.

Further, the adverse action alleged is merely the specula- tion that the members of Complainant would be discharged if the refused to work because of hazardous conditions. This is not adverse action, but only the possibility of future adverse acti The complaint also seems to allege that being required to work an unhealthy environment is adverse action. But Complainant an its members are not required to work in an environment reasonab believed to be unhealthy, and they would be protected if they refused to work under such conditions. I conclude that no past present adverse action has been alleged here.

Therefore, I conclude that the complaint does not state a cause of action under section 105(c) of the Act.

IS MSHA SUBJECT TO 105(c)

Section 105(c) is directed to "any person." I have pre-

the right to call for an immediate inspection by giving MSHA notice of an alleged safety or health violation or an imminent danger in a mine. If MSHA determines that a violation or danger does not exist it must so notify the representative in writing.

Under 30 C.F.R. § 43.7, the representative of the miners may obtain an informal review by the MSHA District Manager or his agent who is required to furnish a written statement of the reasons for the final disposition of the matter.

The Act does not provide for Commission review of such disposition and MSHA argues that the Commission has no jurisdiction in such cases. In view of my holding that the complaint herein does not state a cause of action, it is unnecessary to rule on this issue, and I do not do so at this time.

ORDER

Therefore, IT IS ORDERED that this proceeding is DISMISSED for failure to state a cause of action under section 105(c) of the Act.

James A. Broderick
Administrative Law Judge

Distribution:

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Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

December 14, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 82-306
	:	A.C. No. 36-05018-03502
v.	:	
	:	Cumberland Mine
U. S. STEEL MINING CO., INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Thomas A. Brown, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is before me upon a Petition for Assessment of Civil Penalty under Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act). The Petitioner has made a motion to approve a settlement agreement. Payment of the original penalties of $217 was proposed. At the hearing I determined that the profferred settlement was appropriate under the criteria set forth in Section 110(i) of the Act. I now affirm that determination.

WHEREFORE, the motion for approval of settlement is GRANTED and it is ORDERED that Respondent pay $217 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 83-221
	:	A.C. No. 36-00970-03527
v.	:	
	:	Maple Creek No. 1 Mine
U. S. STEEL MINING CO., INC., Respondent	:	

DECISION

Appearances: Thomas A. Brown, Esq., Office of the Solicito
U. S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh,
Pennsylvania, for Respondent.

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against U. S. Steel Mining Company, Inc. for three alleged violations of the mandatory safety standa 30 C.F.R. §§ 75.1704, 75.200 and 75.1725(c).

The hearing was held as scheduled and documentary exhibits and oral testimony were received from both parties At the conclusion of the hearing, I directed the filing of written briefs simultaneously by both parties within 21 day of receipt of the transcript (Tr. 137). The briefs have been received and reviewed.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 6-8):

Steel Mining Company, Inc. is the owner and
r of the Maple Creek No. 1 Mine.

3. The presiding administrative law judge has jurisdic over this proceeding.

4. The subject citations, modifications and determinat were properly served on the operator by a duly auth representative of the Secretary. The citations, modifications and determinations may be admitted into evidence for the purpose of establishing thei issuance and not for the truthfulness or relevancy of the statements asserted therein.

5. The authenticity of all exhibits is admitted, but not the relevancy or the truth of the matters asse therein.

6. The alleged violations were abated in a timely fash

7. The operator has annual production of 10,943,308 to

8. The subject mine has annual production of 482,015 t

9. All witnesses are accepted generally as experts in coal mine health and safety.

10. There were 3 assessed violations of 30 C.F.R. § 75. in the 24-month period prior to the subject § 75.1 alleged violation but some of the prior violations have been contested.

11. There were 28 assessed violations of 30 C.F.R. § 7 in the 24-month period prior to the subject § 75.2 alleged violation but some of the prior violations have been contested.

12. There were 2 assessed violations of 30 C.F.R. § 172 in the 24-month period prior to the subject § 75.1 alleged violation but some of the prior violations have been contested.

13. The payment of the penalties will not affect the operator's ability to continue in business.

The Mandatory Standard

Section 75.1704 of the mandatory standards, 30 C.F.R. § 75.1704, provides as follows:

§ 75.1704 Escapeways.

[Statutory Provisions]

Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

The Cited Condition or Practice

Citation No. 2011053 cites a violation of 30 C.F.R. § 75.1704 for the following condition:

There was no directional sign provided where the designated intake escapeway from 53 room enters the main intake escapeway to Park [Shaft]. Persons could make a mistake and go inby to 56 room.

The inspector who issued the subject citation testi
that there was no directional signal for the designated
escapeway from the 53 room at the main intake escapeway to
Park Shaft. The inspector expressed the opinion that mine
could make a mistake and go inby (Tr. 11). The inspector
testified that the operator marks its escapeways with
reflectors and that reflectors were present in the escapew
on the day the citation was issued (Tr. 15). According to
the inspector, the reflector nearest the cited intersectio
was 50 feet outby the intersection (Tr. 26-27). The in-
spector admitted that miners coming to the intersection
would see a green reflector when looking to the left (outb
and would not see any reflector if they looked to the righ
(inby) (Tr. 16). The inspector stated that the reflector
was readily visible when the miners got into the escapeway
(Tr. 27). The inspector further agreed that there was a
considerable volume of air coming up the intake escapeway
the cited intersection and that if a miner were knowledgea
of the air in the mine he would know which direction was
outby based on the direction of airflow (Tr. 19). It was
the inspector's position that an intersection should have
directional arrow marking the exit route even when a re-
flector is used. He acknowledged the operator was never
on notice an arrow was required in addition to the reflec
(Tr. 23-24).

The assistant mine foreman who accompanied the inspec
during the inspection testified that the intake escapeways
are marked with green reflectors, the return escapeways a
marked with red reflectors and the alternate return escape
is marked with white reflectors (Tr. 31, 34). The reflec
are usually hung from the roof in the middle of the entry
(Tr. 32). Contrary to the inspector's testimony, the
assistant mine foreman stated that in this instance there
was one reflector about 20 feet outby the cited intersecti
and another one approximately 85 feet outby (Tr. 32). He
said that miners would see green reflectors if they looked
to the left at the intersection and the miners were trained
to follow the reflectors (Tr. 35-36). While admitting the
miners must come into the intersection to see the reflecto
20 feet away, the assistant mine foreman noted that the
miners have to enter the intersection in order to escape
(Tr. 37). He also stated that reflectors are a better
indicator than arrows when smoke is present because the

arrows are on porcelainized metal signs that are not reflective (Tr. 33, 38). Additionally, the assistant mine foreman testified that in traveling to the shaft bottom in the intake escapeway miners simply keep the air current to their faces. He stated that the air velocity at the cited intersection is 24,000 cubic feet per minute, which is sufficient to enable miners to feel the air current on their faces (Tr. 33, 36).

The subject standard mandates only that escapeways be "properly marked." The term "properly marked" is not defined. Specific types of markings and their placement are not delineated. The evidence is clear that the operator used green reflectors in the cited escapeway. I accept as more persuasive the operator's evidence regarding the distance of the reflector from the intersection. Based upon the record I find that the reflector was clearly visible when looking left from the intersection and that miners were properly trained as to what the reflectors meant. I am unpersuaded by the Solicitor's argument that reflectors are inadequate because miners must enter the intersection before observing the reflector since miners must enter the intersection to make use of the escapeway. Also, there is no merit to the argument that the reflectors are inadequate because smoke would obscure miners' vision of the reflectors. The testimony shows that where there is smoke reflectors are more visible than arrows.

In light of the foregoing, I conclude the escapeway was properly marked within the meaning of the mandatory standard. If the Secretary believes something more or different than reflectors should be required, he must undertake to change the standard. He cannot accomplish such a result merely by issuing a citation on an ad hoc basis in an individual situation. Accordingly, I conclude there was no violation and the citation is Vacated.

I have reviewed the briefs. To the extent they are inconsistent with the findings and conclusions set forth above they are rejected.

Section 75.200 of the mandatory standards, 30 C.F.R. § 75.200 provides as follows:

§ 75.200 Roof control programs and plans.

[Statutory Provisions]

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

§ 75.200 for the following condition:

> No. 33 room intersection in "A" heading was 35 feet from corner to corner both diagonals. Total distance 70 feet. One part of 33 room intersected at a 52° angle. The roof control plan stipulates if either diagonal or a total of both diagonals exceed 32 feet or 62 feet, respectively, additional support posts and/or crib will be installed. Section was supervised by R. Franks.

Discussion and Analysis

The inspector who issued the subject citation testified that the cited intersection was wider than allowed by the roof control plan (Tr. 44-45). Drawing No. 4 of the plan contains the statement that if the diagonal distances in an intersection exceed 32 feet each or if the sum of the diagonals exceeds 62 feet, additional support shall be provided (MSHA Exh. 3). According to the inspector's measurements, each diagonal distance in the cited intersection was 35 feet (Tr. 45). These measurements are not disputed. Drawing No. 4 itself is a four-way intersection with the entries meeting at right angles. The cited intersection was not created by four entries joining at right angles. One of the entries joined the intersection at a 52° angle ("B" on Op. Exh. 1, Tr. 60).

The existence of a violation depends upon whether the statement on Drawing No. 4 applies to this case. The operator contends it does not because the statement only applies when entries meet at right angles as they do in the drawing. I must reject this argument. I find the drawing illustrative rather than exclusive and conclude that the statement applies to all four-way intersections where the entries come together at the same place regardless of the precise angles at which they meet. The title of Drawing No. 4 is "Minimum Permanent Roof Support for Intersections." Moreover, the plan contains no other provision concerning minimum diagonal lengths for intersecting entries. To limit the general statement requiring additional supports to the precise configuration depicted by the drawing would render

required by the plan. Because there was no such additional bolting I conclude a violation existed.

I further conclude the violation was significant and substantial. The inspector testificd that there was a slip running down the center of the roof of the 33 room which ent across the intersection and into the rib where entry "B" entered the intersection (Tr. 46). The inspector sounded the top of the roof with a metal-capped walking stick and noted that the top was heavy. The heavy top indicated to the inspector that the roof could change at any time, especially where, as here, the intersection was larger and the diagonals greater than allowed by the plan. I conclude that based on the foregoing factors the violation was "significant and substantial" within the meaning of that term as defined by the Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981).

I further find the operator was negligent. The operator drove entry "B" at a 52° angle because track was going to be put down. Although driving the entry at such an angle is permissible, additional roof support should have been provided as required by the plan because more coal had been cut away than in normal situations. The slip added to the hazard. There is no dispute that the operator knew of all these things.

The remaining statutory criteria are set forth in the stipulations. After consideration of all the criteria a penalty of $250 is assessed for this violation.

I have reviewed the briefs. To the extent they are inconsistent with the findings and conclusions set forth above they are rejected.

The Mandatory Standard

Section 75.1725(c) of the mandatory standards, 30 C.F.R. § 75.1725(c) provides as follows:

> § 75.1725 Machinery and equipment; operation and maintenance.
>
> (c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

The Cited Condition or Practice

Citation No. 2012695 cites a violation of 30 C.F.R § 75.1725(c) for the following practice:

> Men were observed in the boom at the continuous miner, working on the conveyor chain and the power source for CM-12 S/N JM 3226 was not disconnected at the power source. Section supervised by R. Franks.

Discussion and Analysis

The inspector who issued the subject citation test that he saw men in the boom of a continuous miner and the boom beating with a sledge hammer on what appeared a flight chain. The power was cut off at the machine than disconnected at the source (Tr. 102-103). The ins took the position that the miners might be seriously i or killed if the machine became energized and that powe to be cut off not only at the machine but at the power source (Tr. 103-104). However, he was not certain wha miners were doing at the machine (Tr. 107-108). He di appear to be familiar with how the cited continuous mi actually worked (Tr. 106-107, 110-113, 115-116, 136).

The operator's maintenance foreman who testified strated familiarity and knowledge about the operation continuous miner. He explained that in order for powe reach the tail section of the conveyor where the miner located, someone would have to s t the main power b ea

alk around to the right side of the machine and turn on a ontrol switch in the cab, turn on the pump motor and then tart the conveyor (Tr. 118, 121-123). The maintenance oreman admitted that equipment can malfunction, but stated hat in this instance five different pieces of equipment ould have to malfunction at the same time for power to xtend to the area in question (Tr. 120).

The maintenance foreman stated that the miners were epairing a broken conveyor chain when the citation was ssued and that the machine's power must be used to repair he chain (Tr. 123-124). He further explained that the onveyor has to be raised, lowered, and swung to one side; hat the conveyor is swung to one side and brought back to he normal position to slacken the chain; that the chain is hen recoupled and put back on the drive sprocket; and that he chain comes off the drive sprocket every time it breaks Tr. 125). According to the foreman machine power is ecessary to make all these various adjustments because the ump motor must be running to raise the conveyor, swing it nd drop it (Tr. 126-127).

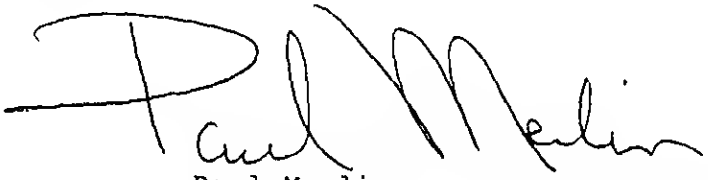
I accept the foregoing testimony from the foreman. ndeed, as already noted the inspector did not know how the achine operated or even what repair work was being done. am constrained to decide this case on this record where he evidence submitted by the operator is manifestly uperior to that offered by the Solicitor who barely ross-examined the operator's witness and whose inspector id not know much at all about the machine he cited.

Accordingly, I conclude that machinery motion was ecessary to make adjustments and that under the circum- tances the operator should not have been required to cut he power at the source and necessitate frequent trips ack and forth from it to the continuous miner in order o effectuate the necessary repairs to the broken chain. conclude there was no violation. This citation is acated.

I have reviewed the briefs. To the extent they are consistent with the findings and conclusions set forth ove they are rejected.

Citation Nos. 2011053 and 2012695 are VACATED.

It is further ORDERED that with respect to Citation N 2012693, the operator shall pay $250 within 30 days from t date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

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		Docket Nos:	Citations
	:		
	:	PENN 83-171-R	2104356
	:	PENN 83-172-R	2104357
	:	PENN 83-173-R	2104358
	:	PENN 83-174-R	2104359
	:	PENN 83-175-R	2104360
	:	PENN 83-176-R	2104632
	:	PENN 83-177-R	2104633
	:	PENN 83-178-R	2104634
	:	PENN 83-179-R	2104635
	:	PENN 83-180-R	2104636
v.	:	PENN 83-181-R	2104637
	:	PENN 83-182-R	2104638
	:	PENN 83-183-R	2104639
	:	PENN 83-184-R	2104640
	:	PENN 83-185-R	2104648
	:	PENN 83-186-R	2104649
	:	PENN 83-187-R	2104650
	:	PENN 83-188-R	2104651
	:	PENN 83-189-R	2104652
	:	PENN 83-190-R	2104653
	:	PENN 83-191-R	2104654
	:	PENN 83-192-R	2105121
SECRETARY OF LABOR,	:	PENN 83-193-R	2105122
MINE SAFETY AND HEALTH	:	PENN 83-194-R	2105123
ADMINISTRATION (MSHA),	:	PENN 83-195-R	2105124
Respondent	:	PENN 83-196-R	2105125
	:	PENN 83-215-R	2105330
	:		
	:	Vesta Mine	

DECISION

ppearance: Michael T. Heenan, Esq., Smith, Heena, Althen and Zanolli, Washington, DC, for Contestant; Mary Lu Jordan, Esq., United Mine Workers of America, Washington, DC, Intervenor; Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Viginia, for Respondent.

Before: Judge Moore

filed briefs. There was a prehearing conference at which the United Mine Workers of America was not represented. At that conference certain drawings were presented, and while there are minor differences the photographic and sketch material attached to Vesta's answer to the government's motion to dismiss and the exhibit presented at the pre-trial conference and government Exhibit R-4 all describe the electrical connections used in Vesta's transformers. In the testimony, these transformers are sometimes referred to as power centers or load centers, or in one case, as rectifiers. This last term was a misnomer as a rectifier is a device which converts alternating current into direct current.

The knife switch referred to hereinafter is sometimes referred to in the testimony as a "load brake switch" or as a" visible disconnect switch".

Because of the electrical configuration of the transform which will be described later, MSHA first issued a citation as to one of those transformers. It later decided that there was no violation and vacated that first citation. MSHA then issued 26 citations, being one for each transformer Notices of contest were filed with a request for an expedited hearing.

Shortly after the conference mentioned earlier, and because MSHA believed there had been procedural errors in the way the 26 citations were issued, it vacated those citations and moved to dismiss the notices of contest. Vesta objected to the dismissals because it contended it had a right to a decision on the merits but stated that if I did dismiss the cases it should be with prejudice against MSHA issuing citations concerning the particular transformers involved. The United Mine Workers of America then intervened and objected to the vacation of the citations and pointed out that I did not have to approve that action.

Shortly thereafter MSHA decided that Vesta was not being cooperative and issued another citation covering all 26 transformers. Vesta then filed another notice of contest with a request for an expedited hearing and a request that all of the cases be consolidated.

Vesta's response to the Secretary's motion to dismis

ers, (not counting 110-V circuits) one of which is used
nection with the solid power line to the belt motors
e other is in connection with an auxiliary plug which
ometimes be used for other equipment such as a belt
izing device. Any equipment hooked up to the auxiliary
is either plugged in or not, so there is no question
the disconnect device assures a visual check. In a
t breaker, on the other hand, the disconnect is inside
e housing and there is no way to visually check and be
that a circuit is disconnected. The solid connection
to the belt drive motors on the low voltage side
ns only the circuit breaker as a means of disconnecting
ransformer from the motors.

The question is whether the standard allows the type of
gement described. 30 C.F.R. 75.903, a statutory pro-
n, provides

"disconnecting devices shall be installed in con-
junction with the circuit breaker to provide visual
evidence that the power is disconnected."

s transformers clearly contain the knife-switch on the
voltage end which provides visual evidence that the
former itself, is disconnected. At the low voltage end
er, only the auxiliary plug provides visual evidence of
connection.

While I have stated that there is no substantial disagreement
the electrical connections in and around the transformers
of the witnesses did not interpret government exhibit
the same way. Mr. Lester, MSHA's top electrical
t, thought there was a circuit breaker controlling the
drive motor that is not shown on the drawing. Other
sses said that the box marked "breaker main low side"
olled the belt drive motor. One witness said that the
ker main low side," when disconnected, would also
nect the vulcanizing plug which has its own circuit
er as shown on government exhibit R-4. Mr. Paine, the
president of Vesta, testified that all of the transformers
een modified so that the vulcanizing plug and its
it breaker were hooked into the outby side of the
ker main low side" box. He said that this had been
fore the hearing. His stimony, taken together wit

is not electrical work and there is no requirement that a visual disconnect be provided. There is a requirement, however, that the power be taken off of the belt drive motor when non-electrical work is being done and as I understand government exhibit R-4 as amplified by Mr. Carnathan and Mr. Paine, that could not be done with respect to at least some of the transformers. If the vulcanizing (auxiliary) plug circuit is hooked to the inby side of the motor circuit breaker you could not have power in the vulcanizer and no power on the drive motor circuit. It could be done now, according to Mr. Paine. But whether there was a violation of some other standard is not the question before me. A step-down transformer, such as the one involved in these cases, contains 2 physically separate windings or coils. High voltage electricity passing through the primary winding by the process known as electro-magnetic induction, causes low voltage current in the secondary or low voltage coil. It is the government's position, as expressed by its leading electrical inspector, that the low voltage side is a separat circuit, and thus requires its own visual disconnect blade. When Mr. Lester was on the stand, he mentioned the two break boxes, one designated a belt starter and the other merely designated breaker box on the lower of the two rectangles depicted on government exhibit R-4. The lower rectangle is designated Westinghouse, and there is no explanation as to what that means. Since Mr. Lester did not indicate that a visual disconnect was necessary with respect to the "breaker box" and the "belt starter box" it is obvious that the government is not contending that there need be a visual disconnect with respect to each circuit breaker. The govern contention insofar as Mr. Lester is concerned, is that since the high voltage circuit in thc transformer and the low voltage circuit are separate circuits, that each needs its own visual disconnect switch. Counsel, by questions and arguments indicated that it was also a matter of the physica distance between the visual disconnect switch on the high voltage side of the transformer and the breaker box on the low voltage side. The distance in fact, was about twenty feet but there were questions concerning whether one hundred feet would be close enough or several hundred feet.

Mr. Blackburn, the president of Tee Engineering Company is an electrical engineer and formerly worked under Mr. Lester as he dist ict electrician for VCW

o the basis of my decision I will announce that I have onsolidated all these cases for hearing, I reaffirm my efusal to grant MSHA's motion to dismiss the first 26 cases nd I admit in evidence the documents attached to Vesta's pposition to MSHA's motion to dismiss those 26 cases. hile admitting the drawings and photographs referred to bove, I am basing this decision primarily on government's xhibit R-4. In this respect the two wires leading from the breaker main low side"-one designated fire suppression and he other designated pilot check cable-are 110-V circuits ingle-phase power and have nothing to do with the requirements f 30 C.F.R. 75.903. In questioning Mr. Lester, I asked im, MSHA's leading electrician, whether the system would be n compliance if the two 110-volt lines were eliminated and f the vulcanizer plug and its breaker box were eliminated. is answer was No. He said the high voltage side of the ransformer was a separate circuit from the low voltage side nd that the visual disconnect switch on the high voltage ide did not satisfy the regulation. 2/ In the simplified ypothetical that I was asking about there would be 7200 olts going into the high voltage side of the transformer nd there would be a visual disconnect switch at that oint. There would be a breaker box on the low voltage side f the transformer and through that box, 480 volts would go o the belt drive motor. In my view, even though it is 20 eet away, the visual disconnect switch is "in connection ith" the breaker, even though there is no physical connection etween the high voltage side of the transformer and the low oltage side.

I do not think the safety arguments made by the parties ffect this result. On the one hand, the argument is that ith a visible disconnect plug such as the vulcanizer plug n government exhibit R-4, you could easily verify that the ircuit is broken. The other argument is that in a dark and et mine mistakes in tracing lines are made and it is much asier to simply go to the transformer and use the visual isconnect switch knowing that everything downstream of that

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/ I am not giving consideration to the affidavit attached to the government's brief. If the government thinks it has evidence of perjury it should consult the United States Attorney's Office.

/ Without objecti n Mr. Hoenan altered government exhibit R-4

I hereby VACATE all 27 citations. These cases are DISMISSED.

Proposed findings not included herein are REJECTED.

Charles C. Moore, Jr.
Charles C. Moore, Jr.,
Administrative Law Judge

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Mary Lu Jordan, Esq., United Mine Workers of America, 9 15th Street, NW., Washington, D.C. 20005 (Certified Mai

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Dep ment of Labor, 4015 Wilson Boulevard, Arlington, VA 2220 (Certified Mail)

ALBERT J. DICARO, Complainant	:	COMPLAINT OF DISCRIMINATION
	:	Docket No. WEST 82-113-D
v.	:	
	:	MSHA Case No. DENV CD 82-3
UNITED STATES FUEL COMPANY, Respondent	:	

DECISION ON DAMAGES AND OTHER RELIEF

Before: Judge Fauver

Complainant filed his complaint on February 15, 1982, alleging he was discharged on October 23, 1981, for engaging in protected activities in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The matter was heard on the issue of liability in July, 1982. My decision on liability was entered on May 26, 1983, holding that Complainant was unlawfully discharged on October 23, 1981. The hearing on damages and other relief was held on August 9, 1983.

Counsel for the parties have stipulated:

1. Had Complainant not been discharged, the maximum amount of his wages and overtime in Respondent's employment from October 23, 1981, through August 9, 1983, would have been $44,613.00.

2. Interest is to be calculated on back pay on a calendar quarter accrual basis.

3. The rate of interest to be applied shall be twelve percent (12%).

4. The instant case is the Complainant's attorney's first case involving the Federal Mine Safety and Health Act.

5. Complainant's attorney's law firm has never represente clients in a matter involving the Federal Mine Safety and Health Act prior to the instant case.

by applying for other employment. The Complainant app
employment at the following companies:

(a) as a coal miner at Tower Resources on November 9, 1981;

(b) as a coal miner at Price River Coal Com on November 12, 1981;

(c) at Plateau Mining Company on December 2 15, and 17, 1981;

(d) at Coastal States Mining on December 21 29, 1981 and January 19, 1982;

(e) as a coal miner at Emery Mining Corpora in March of 1982 and was told he did no get the job because of a recommendation the Respondent, United States Fuel Comp

(f) as a coal miner with Valley Camp on March 22, 24, 29, April 23, 26, May 3, 12, 1982;

(g) at Dinosaur Tire in Price, Utah on seve occasions;

(h) at State Department of Employment Servi in Price, Utah;

(i) at Carbon County Sheriff's Department f the position of Deputy Sheriff;

(j) at H & J Supply Company in Price, Utah;

(k) at Gemco Corporation, Price, Utah.

2. Complainant was employed by Terry Fry, a cont of Plateau Mining during the period at issue. Complai earned $1,000 at such employment. He was also employe One Stop Video Shop on a piecework basis during that p

piecework basis and he earned a maximum of $200 from said employment.

3. Complainant also worked for Western States Hydraulic during the same period. The Complainant's earnings were a maximum of $200 from Western States Hydraulics. The total received by Complainant from employment during the interim pe in question was $1,400.

4. As of the date he was discharged by Respondent, Comp had a 5% permanent partial disability because of an accident Respondent's mine. Later Complainant filed a petition with t Industrial Commission of Utah seeking additional permanent pa disability and temporary total disability for a period beginn November 5, 1982. Complainant filed the petition on his own behalf and without the aid of counsel. At the hearing, Compl testified in response to a question from counsel for Responde United States Fuel Company, "I think I can perform as a roof Complainant's allegation of temporary disability was based upon his doctor's opinion, and in his (Complainant's) opinion he could have worked.

5. The Industrial Commission of Utah referred Complaina to its medical panel which consisted of Dr. Thomas D. Rosenbu Salt Lake City, Utah. Dr. Rosenburg examined Complainant and concluded that there was no temporary total disability. He a concluded that the permanent partial disability in Complainan knee had increased from 5 percent to 15 percent. The Industr Commission adopted the findings of the medical panel and foun

> [T]he applicant (referring to Complainant) was not temporarily totally disabled after November 5, 1982 and the percentage of permanent physical impairment attributable to the applicant's industrial injury is 15 percent of the right lower extremity. This percentage has changed from 5 percent (torn medial meniscus meniscectomy) to 15 percent in view of the significant associated disease of articular cartilage in the medial compartment of the patient's right knee.

The general issue is the amount of the recoverable da sustained by Complainant as a result of his unlawful disch on October 23, 1981.

In particular, the issues are:

(1) Was Complainant physically able to work for Resp on and after November 5, 1982? If not, should his back pa award be reduced for any period in which he was unable to work for Respondent?

(2) Should Complainant's back pay award be reduced b an amount representing Complainant's rate of absenteeism while employed by Respondent?

(3) Should the decision on liabilitiy be reconsidere and resolved against Complainant because of new evidence o Complainant's credibility introduced at the August 9, 1983 hearing on damages?

(4) What hourly rate should be applied in awarding a attorney's fee for Complainant's legal representation in this proceeding?

Section 105(c)(2) of the Act states, among other thin

> The Commission shall have authority...to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. ***

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

In Secretary on behalf of Dunmire and Estle v. Norther Coal Company, 4 FMSHRC 126 at 142 (1982), the Commission stated that the "broad remedial charge [of section 105(c)(2)] was designed not only to deter illegal retaliation but also to restore the employee, as nearly as possible, to the situation he would have occupied but for the discrimination and that "back pay [is] a term of art encompassing not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer overall wage-benefit package."

Back pay is "ordinarily the sum equal to the gross pay the employee would have earned but for the discrimination less his actual net interim earnings." Dunmire, above, at 144.

Ability To Work
Since November 5, 1982

Respondent contends that Complainant's claim before th Utah Industrial Commission establishes that he was not phys able to work for Respondent on and after November 5, 1982. However, the Utah Industrial Commission ruled, after having Complainant medically examined, that Complainant was not en to temporary disability and was capable of working on and after November 5, 1982. Before his discharge on October 23 1981, Complainant had a 5% lower extremity impairment becau of a knee injury in Respondent's employment. The Utah Indu Commission found, based on its medical panel report, that

Absenteeism

Respondent proposes that the back pay award be reduced Complainant's rate of absenteeism while employed by Respond I find no precedent for this contention. Use of this extre and speculative approach to back pay relief would not be consistent with the broad, remedial charge of the statute.

Attorney's Fee

I agree with Respondent's contention that Complainant attorney's fee should be set at $75 an hour, i.e., the lowe rate in the law firm's schedule of fees. In reaching this decision I have considered the following factors, among oth

1. This proceeding is the first case involving the M Act that Complainant's attorney has handled as an attorney

2. Complainant's attorney's law firm has never repres clients in matters involving the Mine Act before this proc

3. Complainant's attorney's law firm has a fee schedu range of $75 to $125 an hour.

The Motion to Reconsider

Respondent has moved to reconsider my decision on liab (May 26, 1983) based on "serious questions concerning the credibility of the Complainant" which Respondent contends raised by "new evidence" at the hearing on damages (August 1983). I have fully considered the August 9, 1983, transc and exhibits and conclude that credibility issues on damag not warrant reconsideration of the decision on liability.

ORDER

WHEREFORE IT IS ORDERED that, within 15 days of the d this decision:

1. Respondent shall offer Complainant, in writing, reinstatement in its employment upon Complainant's providin written medical evidence of his physical ability to work as a miner in Respondent's employment, in such position as Complainant would have been employed, with the pay rate and seniority, shift and overtime rights, employer contribution and other fringe benefits that Complainant would have obtai had Respondent not discharged Complainant on October 23, 19 Evidence of his physical ability to work may be satisfied b a written release to work in a coal mine by Thomas D. Rosen M.D.

2. Respondent shall pay Complainant back pay of $43,2 for the period from October 23, 1981, through August 9, 198 (i.e., $44,613.00 less $1,400.00 for interim outside earnin and an additional amount of back pay based upon the maximum amount of wages and overtime he would have received in Resp employment from August 9, 1983, until either (a) his reinst under paragraph 1, above, or (b) 15 days from the date of t decision if Complainant does not accept reinstatement or do not medically qualify for reinstatement.

The back pay in the period since August 9, 1983, is su to reduction by any interim earnings since August 9, 1983. back pay since August 9, 1983, cannot be stipulated by coun for the parties, counsel shall submit their respective prop amounts to the judge not later than 20 days from the date o this decision and for that purpose jurisdiction is retained the judge for 20 days from this date and until a ruling on counter-proposals filed in such period. Interest on the to award of back pay shall be at 12%, calculated on a calendar quarter accrual basis.

3. Respondent shall pay Complainant's attorney a fee $14,625.00, i.e., 195 hours X $75 per hour.

4. Respondent shall pay Complainant litigation expens of $350.00.

5. Respondent shall post a copy of the decision of May 26, 1983 and a copy of this decision and order at the subject mine, at a place where notices to its miners are no posted, and keep them so posted, unobstructed and protected

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Salt Lake City, Utah 84101 (Certified Mail)

Barry D. Lindgren, Esq., P.O. Box 539, Denver, Colorado 8020
(Certified Mail)

BILLY K. DEEL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 82-62-D
v.	:	
	:	MSHA Case No. NORT CD-82-17
D. O. & W. COAL COMPANY, Respondent	:	No. 5 Mine

DECISION

Appearances: Michael A. Genz, Esq., and Barbara A. Samuels, Esq., Client Centered Legal Services of Southwest Virginia, Inc., Castlewood, Virginia, for Complainant;
Louis Dene, Esq., Abingdon, Virginia, for Respondent.

Before: Judge Steffey

A hearing was held in the above-entitled proceeding on February 15, 16, 17, and 18, and April 26, 1983, in Abingdon, Virginia, pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3) of the Federal Mine Safety and Health Act of 1977. The complaint was filed on September 23, 1982, and supplemented on Ootober 12, 1982, and October 27, 1982. The complaint was fil under section 105(c)(3) of the Act after complainant had received a letter from the Mine Safety and Health Administration advising him that MSHA's investigation of his complaint had resulted in a finding that no violation of section 105(c)(1) of the Act had occurred.

Counsel for complainant and respondent filed simultaneous initial posthearing briefs on July 15, 1983, and July 18, 1983 respectively. Counsel for respondent and complainant filed on August 31, 1983, and September 2, 1983, respectively, letters stating that they were waiving the filing of reply briefs.

Issues

Complainant's brief contends that complainant was engaged in activities protected from acts of discrimination by section 105(c)(1) of the Act, that his discharge by respondent was mot vated by that protec ed ac ivi y, and ha respondent would no

the preponderance of the credible evidence, the following
ings of fact are made:

1. D. O. & W. Coal Company (hereinafter referred to
"DOW") operates a one-unit mine in Southwest Virginia.
produced from a single working section having seven entri
The mining process, prior to July 1982, consisted of shoo
coal from the solid, that is, without using a cutting mac
to undercut the coal seam prior to setting off explosives
coal was transported from the working face to the belt co
by means of battery-powered scoops. DOW employs about 3
on two production shifts. In July 1982 the mining syster
changed to use of a continuous-mining machine and shuttl
equipped with trailing cables were substituted for the s
which had previously been utilized to transport coal to
belt conveyor.

2. A fire occurred in the mine in February 1982 an
result of the fire, the Mine Safety and Health Administr
placed the mine on a 10-day spot inspection which was st
effect at the time the hearing was held in this proceedi
February and April of 1983. The inspector regularly ass
to examine the mine was William H. Strength who testifie
this proceeding that he made spot inspections of both th
lines and working faces on April 5, 6, 15 through 22, an
and 6, 1982. He also conducted a complete regular inspe
May 24 through June 3, 1982.

3. Complainant Billy K. Deel was first employed by
or about January 17, 1980. The mine encountered some un
producing conditions which resulted in DOW's laying off
miners on the 3-to-11 p.m. shift about July 17, 1981, in
Deel. At the time of Deel's lay-off, he held the positi
mine committeeman. Prior to the second shift's lay-off,
brought to DOW's attention the fact that the miners were
because DOW had changed the date of issuance of their pa
from Thursday to Friday. DOW claimed that the change in
for issuance of checks had resulted from a time lag in a
puter used by a bank in Pikeville, Kentucky, and DOW ref
reverse its decision to issue the checks on Friday. Whe
miners heard that DOW had refused to revert to a Thursda
day, they declined to go into the mine to work, claiming
although they had been well enough to report to work and
enough to await he ou come of h ir complaint abou he

new area off to the left of the mine's main entries. When Deel heard that DOW was recalling miners, he made some telephone calls and visited the mine. He was so anxious to obtain work to support his wife and child, that he volunteered to sign a statement to the effect that he would not cause DOW's management further trouble if they would rehire him (Exh. A). DOW's mine foreman did not believe that Deel had waived any of his rights under the Act or the UMWA wage agreement by having signe the statement.

5. Deel was recalled to work on the day shift on or about March 5, 1982, and was told that he would be paid top contractual wage rates, but that there was no specific job available and he would be required to operate the scoop, the roof-bolting machine, or to shovel coal along the belt line, although at the time of his lay-off on July 17, 1981, he claims to have successfully filed a bid for the job of an operator of a roof-bolting machine.

6. On April 3, 1982, about a month after being recalled to work, Deel was elected by the union to the position of safet committeeman to replace Chann Fields, a shotfirer, who had previously held that position for about 4 years. DOW was notified of Deel's election as safety committeeman on April 5, 1982, and Deel continued to hold that position for 32 days, or until he was discharged on May 7, 1982.

7. The drilling of coal in DOW's mine was performed by use of a hand-held drill which received its hydraulic power fro the roof-bolting machine or a scoop. When the section foreman had a full crew of miners, he would assign two men to operate the roof-bolting machine. One of them would install roof bolts and the other one would drill holes in the face so that the sho firer could prepare the heading for another explosive charge. DOW used two roof-bolting machines. Deel and Randy O'Quinn normally operated one roof-bolting machine and associated drill and Kyle Turner and Lee Grizzle normally operated the other roof-bolting machine and drill. Randy O'Quinn hurt his shoulde in February 1982 and was not able to work at the time Deel was recalled to work on March 5, 1982. At times, the section foreman was unable to assign another miner to work with Deel on the roof-bolting machine. Deel's section foreman, Tivis Stiltner, on at least one occasion was unable to obtain a miner to assist Deel in running the roof-bolting mac ine and asked Deel to op-

found that Deel had drilled holes in only one place and had not installed any roof bolts. Stiltner believed that Deel should have been able to accomplish more than the drilling of one place by 8:30 a.m. and asked Deel why he was not working. Deel replied that Stiltner could make Deel perform two jobs, but couldn't make him "run at it". Stiltner claims that Deel refused to perform both jobs and that he told Deel he was suspending him with intent to discharge for refusing to operate the roof bolter and drill. Deel, however, asked to talk to the mine committeeman, Kyle Turner, and Turner was able to persuade Stiltner to put Deel back to work after Deel had agreed to perform both jobs. After Deel had returned to work, Stiltner again went to the place where Deel was supposed to be working and he still had not installed any roof bolts. Therefore, Stiltner told Deel that he would help him on the roof-bolting machine for the rest of the day. Stiltner then proceeded to install roof bolts for the remainder of the shift and Deel operated the coal drill.

9. On May 5, 1982, one of the spot inspections referred to in Finding No. 2, supra, was conducted by Inspector Strength who issued three withdrawal orders at that time citing DOW for failure to install temporary supports as required by its roof-control plan, for firing 24 charges from a detonating device which was rated for firing no more than 20 charges, and for failing to have the line curtains installed to within 10 feet of the working faces (Exh. 1). The miners spent the remainder of the day performing the work necessary to abate the violations, but they had not completed the abatement work by the end of the shift and Stiltner asked Deel and Randy O'Quinn to come in 1 hour early on May 6 to finish abating the violations. Strength returned to the mine on May 6 and terminated the orders so that DOW could resume mining operations.

10. On May 7, 1982, the day after the withdrawal orders had been terminated, Floyd O'Quinn, the regular scoop operator, was absent. Stiltner asked Deel to get the large scoop that Deel had been operating from time to time and hook it to the mantrip so that Deel could transport the men into the mine. Stiltner also told Deel that he himself was going to drive the little scoop into the mine because he had an internal bleeding illness and that operating the little scoop aggravated his condition less than operating the large scoop. Deel objected because he also preferred to operate the little scoop, but Stiltner insisted tha Deel

11. It is customary for all of the miners to gather near he door of the parts trailer and mine office before going into he mine. While they were gathered in the vicinity of the parts railer on May 7 (Exh. M), Randy O'Quinn and Kyle Turner heard tiltner assign Deel the job of pulling the mantrip with the coop, but they did not hear any of the argument between Stilter and Deel as to which one would be operating the little coop as opposed to the large scoop. The mine foreman, Joe aylor, also heard Stiltner assign Deel the job of pulling the antrip.

12. When Stiltner reached the working section, he parked he little scoop near the tailpiece where he had some work to o on the controls to the conveyor belt. Deel dropped miners rom the mantrip at their various working places and drove the arge scoop to the vicinity of the roof-bolting machine which e, Randy O'Quinn, and Clayton Justice had been taking turns in perating. Justice had been hired as a prospective foreman on he assumption that DOW's plan to open a new section would aterialize. In the meantime, because of absenteeism by union orkers, Justice had been performing jobs which are normally one by union employees. Specifically, Justice had been drilling holes from the hydraulic power provided by the roof-bolting achine to which Deel and Randy O'Quinn were normally assigned. ustice had sharpened about 16 bits near the parts trailer just fore they came into the mine on the morning of May 7 and the ise of the grinder prevented Justice from hearing Stiltner ssign any work to anyone. Nevertheless, both Randy O'Quinn nd Justice were already preparing the roof-bolting machine and rill for operation before Deel parked the large scoop near the oof-bolting machine.

13. When Deel came to the roof-bolting machine, Justice mmediately realized that three men were more than could be ustified to operate one roof-bolting machine. Therefore, ustice asked Deel what job he was planning to do that day and eel said he was planning to run the roof-bolting machine. ustice replied that he guessed that meant he would have to perate the large scoop which Deel had driven into the mine and eel agreed that Justice had made a correct conclusion. Justic ho had not operated a scoop in DOW's mine for transporting coa o the belt conveyor, was not comfortable with the unorthodox anner in which he had become assigned to be the scoop operator onsequently, Justice got on th lar e oo a rove i about

Deel refused to follow Stiltner's instructions and told Justice to go back and tell Stiltner to come and tell Deel in person if operating the scoop was what Stiltner wanted him to do that day. Justice again returned on the scoop to Stiltner's location at the tailpiece and stated that Deel had refused to run the scoop and wanted Stiltner to come up there and tell Deel in person if Stiltner wanted Deel to operate the scoop. Stiltner then told Justice to park the large scoop and return to the roof-bolting machine and wait until he could finish the repairs on the belt conveyor and come up to talk to Deel. Justice dutifully parked the large scoop and returned to the site of the roof-bolting machine. This time Justice just sat down and waited for Stiltner to show up after he had advised Deel that Stiltner would be there in a little while.

14. After Stiltner had repaired the tailpiece, he got on the little scoop and drove it to the roof-bolting machine where Deel, Justice, and Randy O'Quinn were gathered. Stiltner asked Deel what was wrong and Deel replied that nothing was wrong. Stiltner then asked Deel why he was not operating the scoop and Deel wanted to know why he should run the scoop and let someone else run "his" roof-bolting machine. Stiltner explained that they had not been producing very much coal lately and that Stiltner believed that Deel could do a better job on the scoop than Justice and that he, therefore, preferred that Deel run the scoop for the day. When Deel made no immediate reply, Stiltner then said that if Deel was not going to run the scoop, he should get in the dipper of the scoop Stiltner was operating and Stiltner would take him outside the mine. Deel got his lunch bucket and got into the scoop's dipper.

15. After Stiltner had finished talking to Deel, he looked at Randy O'Quinn who was doing nothing and asked him why he was not working. Randy replied that the auger barrel was bent and he needed a new one before he could begin drilling coal. Stiltner told Randy to go get a new auger barrel. Randy, who is 6 feet 2 inches tall and was working in a mine which ranges from 4-1/2 to 5 feet in height, did not want to walk a few breaks to get an auger barrel which Chann Fields had already gone on a tractor to get. Therefore, Randy said that he was sick and believed he would just go home, so Randy got into the dipper with Deel and Stiltner started to the surface with both men in the scoop's dipper.

the new auger barrel and Randy O'Quinn decided to go back to work and got out of the scoop's dipper and returned to the ro bolting machine. Chann Fields, who had heard Turner's inter- cession on Deel's behalf and who believed the conversation wa at an impasse, spoke up and asked Stiltner to bring him a new shot-firing battery from outside the mine. Fields also sug- gested that Stiltner go ahead and take Deel out of the mine a there was no use in engaging in further arguments. Stiltner told Turner that he could go outside with Deel and they could discuss the matter with the mine foreman, Joe Taylor.

17. When Deel, Turner, and Stiltner reached the surface Stiltner went to the mine office while Deel and Turner went t the house where they kept their miner's cap lights. Stiltner told Taylor that he was suspending Deel for refusing to run t scoop. Taylor asked Stiltner to have Deel and Turner come to the office to discuss the matter, but they entered the mine office about the time Stiltner was going after them. Taylor pressed surprise that Deel had refused to operate the scoop that day, especially since Taylor had already heard about Dee near discharge by Stiltner for refusing to operate the roof bolter and the drill by himself, as described in Finding No. supra. Deel told Taylor that he had not refused to run the s but Taylor felt that he had to support his section foreman an advised Deel that he was suspended with intent to discharge p ing the holding of a 24/48-hour meeting at which they could further discuss the matter.

18. The above-described suspension occurred on Friday, May 7, 1982, and Deel and Turner came to a 24/48-hour meeting on Monday, May 10, 1982, at which time the suspension was con verted to a discharge. Deel filed a grievance under the Nati Bituminous Coal Wage Agreement of 1981 and the matter went to arbitration which resulted in a decision by an arbitrator sus taining the discharge. The decision was issued on June 8, 19 in Arbitration Case No. 81-28-82-96 in a proceeding entitled The United Mine Workers of America, Local Union #7170 v. D. O & W. Coal Company by Arbitrator Peter Judah.

19. On July 14, 1982, Deel was denied unemployment com- pensation on the ground that he had been discharged for misco duct. Deel appealed that unfavorable ruling to the Virginia Employment Commission and the Appeals Examiner held a hearing and issued a decision on October 22, 1982, upholding the refu

testified at the hearing before the Commission's examiner (Virginia Employment Commission's Decision in Billy K. Deel v. D. O. & W. Coal Co., Decision No. 19888-C, January 14, 1983, pages 3 and 4).

Consideration of the Parties' Arguments

Contentions in Deel's Brief

The first six pages of Deel's brief are devoted to a statement of facts which shows that everything alleged by Deel in this proceeding has been convincingly contradicted by DOW's witnesses, or is the subject of several different versions by Deel during cross-examination. My findings of fact above are based on credibility determinations which will hereinafter be explain The first six pages of Deel's brief are rejected as being noth more than a summary of disputed facts.

Deel's Protected Activity

Pages 6 through 42 of Deel's brief are properly placed under the heading, "Contentions of Law" because Deel can only argue the law in this proceeding since none of the credible evidence supports his factual allegations.

Deel's brief (p. 6) properly begins with a reference to t Commission's decision in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3d Cir. 1981) in which the Commission stated that a complainant in a discrim nation case, in order to make a prima facie case, must show th he engaged in protected activity and that the protected activi

1/ Some of the Commission's language about the parties' burde of proof in discrimination cases was rejected in Wayne Boich d/b/a W. B. Coal Co. v. F.M.S.H.R.C., 704 F.2d 275 (6th Cir. 1 but on October 14, 1983, in Case No. 81-3186, the Sixth Circui vacated its decision reported at 704 F.2d 275, except as to ba pay issues, and held that the Commission's Pasula decision pro erly specifies the parties' burden-of-proof requirements in di crimination cases.

Deel, however, completely failed to show that his discharge wa in any way motivated by the fact that Deel was a safety commit man who had brought safety complaints to DOW's attention.

Contentions in DOW's Brief

DOW's brief correctly argues throughout 87 pages that the facts do not support Deel's allegation that his discharge was motivated by the fact that he had engaged in the protected act ity of acting as safety committeeman. DOW's brief (p. 6) quot a portion of section 105(c)(1) of the Act, but fails to quote the last part of section 105(c)(1) on which Deel relies, viz., the portion which provides that a miner may not be discriminat against for having exercised "* * * on behalf of himself or others of any statutory right afforded by this Act." Since De accompanied MSHA's inspector when he was making inspections of DOW's mine, Deel is alleging that he was exercising his rights under section 103(f) of the Act when he accompanied an MSHA in spector. It is true that Deel accompanied an inspector, but the evidence does not show that Deel's discharge was motivated in any way by the fact that he was for a very short time the miners' representative to accompany inspectors at DOW's mine.

DOW's brief (p. 6) renews its motion to dismiss which was denied at the hearing (Tr. 364). DOW correctly argues that th preponderance of the evidence in this proceeding fails to show that Deel was discharged for having engaged in any activities which are protected under the Act. Therefore, DOW's motion to dismiss will hereinafter be granted.

DOW's brief (pp. 6-85) considers Deel's alleged grounds for arguing that his discharge involved a violation of section 105(c)(1) of the Act and shows that all of them are unfounded. It is quite obvious that if I were to paraphrase all of DOW's factual arguments from pages 6 through 85 of its brief and the were to explain why I agree with most of them, and that if I were to paraphrase in detail all of Deel's legal arguments fro pages 6 through 42 of his brief and then explain why I disagre with all of them, my decision would be about 200 pages long.

In order to reduce the length of this decision to a reaso able length, I shall hereinafter consider all of the parties' arguments without giving specific page references and detailed

both parties. Additionally, my ... low a Table of Contents to show exactly where my discussion of the factual and legal arguments may be found so that the parties, or the Commission, if it should grant a petition for discretionary review, may easily find the page or pages on which the various subjects are considered.

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July 16 in asking the question, so there is no reason whatsoe
to select July 16 over July 15. In the other transcript refe
ence (Tr. 50), DOW's counsel used the date of March 4, 1982,
asking the question, but Deel's direct testimony (Tr. 7) shov
that he was uncertain as to the date of March 4, 1982. Joe
Taylor, the mine foreman, did not know for certain when Deel
laid off and guessed that he was recalled about March 3, 198
(Tr. 389). DOW's brief (pp. 2-3) states that Deel was laid
on July 17, 1981, and was recalled on March 5, 1982, but DOW
brief does not provide any transcript references for either
Therefore, I have used the word "about" in Finding Nos. 3 an
supra, in connection with Deel's dates of employment because
record does not support a finding as to any precise dates fo
Deel's dates of lay off and reemployment.

During his direct testimony (Tr. 8), Deel stated that h
was made safety committeeman a "few days" after he was recal
but he was called back to work no later than March 5, 1982,
did not begin acting as safety committeeman until April 5, 1
which was only 32 calendar days before his discharge on May
1982. After he became safety committeeman, he did not work
from 7 to 13 calendar days because of some bruised ribs (Tr.
873). Consequently, Deel actually acted as safety committee
for only 25 or 19 calendar days.

Hauling Explosives on Tractor

Fields, the shot fireman, was hauling explosives on top
a battery-powered tractor at the time Deel was called back t
work about March 5, 1982. Deel contends that an accident in
coal mine in Kentucky occurred because explosives were being
handled in a similar fashion. The accident in the Kentucky
mine caused DOW's employees to ask that Fields be required t
stop hauling explosives on the tractor. Deel claims that he
brought the hazardous powder-hauling practice to DOW's atten
and that the mine foreman, Taylor, told him that DOW had alw
done it that way (Tr. 10). Deel contends that he gave Taylo
weeks within which to get the powder off the tractor and tha
when that was not done, he complained again. After Deel's
second complaint, he alleges that Taylor ordered Randy O'Qui
and Kyle Turner to carry or drag the powder into the face ar
by use of permissible powder bags. The powder was carried i
bags for only 1 day and then Fields resumed the practice of

Fields also claims that the Kentucky mine explosion occurred in December 1981 or January 1982 and that the miners complained to him about hauling explosives on the tractor whil he was safety committeeman and that the mine foreman had a per missible explosives car constructed so that the powder could b hauled with explosives and detonators placed in separate compartments as required by the mandatory safety standards (Tr. 731; 739; 741). Clayton Justice was hired as a trainee sectio foreman on April 19, 1982, and he stated that the explosives were still being hauled on the tractor for about a week after he was hired (Tr. 705; 770; 1027-1028). Fields also testified that he had asked an MSHA inspector whether there was any way a permissible box for carrying explosives could be installed or the tractor and that, while the inspector doubted that such a box could be constructed in compliance with the safety standard he would make a special inquiry about the matter. After Fields subsequently learned from the inspector that it would not be possible to obtain permission to continue hauling the explosive on the tractor (Tr. 715-716), Taylor had an old pump cart removed from the mine and the wheels and frame from the pump were used to accommodate the construction of a permissible powder ca (Tr. 675-676; 762).

Taylor testified that neither Deel nor Randy O'Quinn brought the matter of hauling explosives on the tractor to his attention and that the powder car was constructed and placed in the mine solely on the basis of Fields' having reported the matter to him before Deel ever became safety committeeman (Tr. 407-411; 670-671). Since Deel did not challenge Fields' statement that the Kentucky mine explosion occurred in December 1981 or January 1982, there is no obvious reason why the miners would wait until Deel became safety committeeman in April 1982 to bring up a hazardous practice which had been brought to the miners' attention in December 1981 or January 1982 before Deel was recalled about March 5, 1982.

Randy O'Quinn claimed that Deel brought the matter of hauling powder on the tractor to Stiltner's attention and claimed that Stiltner agreed to bring the matter to Taylor's attention and that management had a box made for hauling the powder. O'Quinn said the box was apparently satisfactory because Inspector Strength did not say anything adverse about their use of the box (Tr. 215-216). O'Quinn also admitted that the of hauling explosives on the tractor was safety

himself to drag the explosives in bags because it was a part
his job as shot fireman to bring in the powder (Tr. 11; 40; 5
55). On the other hand, DOW claims that Randy O'Quinn and Ky
Turner were asked to drag the powder because there are two ro
bolting crews in the mine and that there are two people on ea
crew, whereas Fields, the shot firer, works by himself and is
responsible for shooting from 16 to 20 places per shift (Tr.
760; 830). Deel himself stated that the roof-bolting crews r
mained caught up all the time and were ready to start bolting
in each place as soon as the scoops had finished cleaning up
cut of coal (Tr. 33-34).

Deel's claim that Taylor objected to changing the method
of hauling the explosives on the tractor on the ground that t
had always done it that way was refuted by Fields and Randy
O'Quinn. Fields said he began hauling powder on the tractor
after their permissible powder car was demolished when it was
run over by a scoop (Tr. 731). Randy O'Quinn testified that
and Deel had worked on the second shift in 1981 before the re
duction in force occurred and that, during that time, Deel an
he worked on the same roof-bolting machine and did their own
firing and that they hauled the explosives at that time on to
the roof-bolting machine (Tr. 963-964). Hauling explosives o
roof-bolting machine would cause the explosives to be very cl
to the face prior to the installation of permanent roof suppo
whereas Fields' tractor did not need to be close to the worki
face until after permanent supports had been installed.

In view of the circumstances described above, I find tha
DOW's claim that the hauling of powder was brought to the min
foreman's attention by Fields is more credible than Deel's cl
that he was the person who first brought up the matter of hau
ing powder on the tractor. Moreover, I find that the roof-
bolting crews were chosen for sound reasons as the persons wh
should drag the powder in permissible bags because they remai
caught up with their work and would have had more time to dra
powder than Fields would have had because he had to prepare a
the explosives in each heading, whereas the roof-bolting crew
were able to divide the work of installing bolts among four
persons.

Belt-Bridging Incident

was necessary for them to get on the [illegible]
from the side on which they were traveling, but when th
the person assigned to work at the belt head to cut off
power, he told them the switch had been bypassed or bri
and that he could not turn the belt off at the belt hea
Deel contends that he returned to the section foreman a
they couldn't work along the belt because it had been b
(Tr. 15). The matter was then reported to the mine for
came underground and tried to replace the fuse, but was
do so. Deel claims that he was advised that the belt h
repaired, but when he and Randy returned to the belt he
found that the switch was still bridged out. Deel clai
reported back to Stiltner that the switch was still bri
and that Stiltner told him to call Taylor again (Tr. 16
Deel's second conversation with Taylor, the safety of t
was raised and Taylor told Deel to have the miners come
the mine if they were afraid to work in the mine while
was bridged out. Stiltner talked to Taylor and ordered
miners to leave (Tr. 16). Deel contends that they were
they left that they would not be paid for the remainder
shift, but Taylor contends that the belt-bridging incid
curred on April 16, 1982, and DOW presented as Exhibit
tendance sheet showing that the miners were all paid fo
of work on that day (Tr. 57; 412-415).

Deel also claims that when he and Randy O'Quinn ca
the mine on the day of the bridge-out that Taylor told
had a right to run the belt with the switch bridged out
someone was stationed at the power center to turn off t
in case of an emergency (Tr. 16). Deel claimed that no
stationed at the power center, as alleged by Taylor, bu
gave conflicting statements about how far the power cen
from the belt head (Tr. 14; 60) and it is doubtful that
Deel or O'Quinn really looked to see if anyone had been
at the power center (Tr. 931).

Another claim by Deel in connection with the belt-
incident is that he personally called Inspector Strengt
ported the bridge-out to him and that the inspector cam
mine on the next working day in response to the complai
17). When Inspector Strength testified, however, he st
he had come to the mine in response to a complaint forw
him by his supervisor, but he said that Deel had not ca
personally to complain about the bridge-out (Tr. 1056).
control switch for the belt [illegible]

however, contained no actual notation that the belt-bridging ha anything to do with his being paid only 7 hours on April 5, 198 Moreover, Inspector Strength testified that he performed spot i spections at the mine on April 5 and April 6, 1982, and on each day he checked both the belt lines and the faces (Tr. 1260). Therefore, it would not have been necessary for Deel to have called the inspector on April 5 to report a bridged-out belt be cause Strength would have been present at the time the bridging out occurred. The inspector also testified that he was at the mine on April 15 through April 22 (Tr. 1060). Therefore, Deel should not have had to call the inspector about a bridged-out belt on April 16 either, except that the inspector was not cer- tain that he was present at the mine on each day from April 15 through April 22 (Tr. 1079).

Regardless of whether the mine foreman was correct in con- tending that he had a right to bridge out the belt so long as h stationed someone at the control center, the fact remains that no one ordered either Deel or Randy O'Quinn to work along the belt after the bridged-out switch was called to DOW's attentio The miners were withdrawn and there is no convincing evidence to show that DOW failed to pay them for 8 hours of work. The belt-head switch was repaired before the miners reported for work on the next shift and DOW was cited for no violations by MSHA in connection with the belt-bridging incident. Therefore the preponderance of the evidence fails to support a finding that DOW's management would have been motivated to discharge Deel because he reported to management that the belt-control switch had been bridged out.

Cleaning of Mainline Conveyor Belt

Deel claims that he had been telling Inspector Strength about trying to get DOW to clean up along the mainline belt conveyor, but DOW would not do so. Deel alleged that when In- spector Strength came to the mine the day after the belt-bridg incident, Strength asked him if the belt had been cleaned up y and Deel replied that it had not. Deel claims that the inspec and he then went into the mine and found the belt in such bad condition that Strength issued a withdrawal order as soon as they came out of the mine after inspecting the belt (Tr. 17).

Strength testified that the walk-around miners at DOW's

extended the compliance time to April 21, 1982, and issued Orde No. 922763 on April 21, 1982, when DOW failed to clean up alon the belt by April 21, 1982.

Deel, therefore, was shown to be mistaken about all the details alleged in connection with DOW's being cited for loose coal accumulations. First, Deel had nothing to do with Streng checking of the mainline belt conveyor as Strength had receive no complaint from Deel requesting that a special examination o the beltline be conducted (Tr. 1093). Second, the inspector d not issue any order immediately after finding loose-coal accum lations along the beltline, as alleged by Deel. The order of withdrawal was written 6 days after the citation was issued an the order was issued for DOW's failure to clean up the loose coal within the time given by the inspector and not because Strength considered the violation to be unwarrantable or an im minent danger which would have required immediate action under either section 104(d) or 107(a) of the Act, respectively.

When Deel, for a second time, discussed his role in the citing of DOW for loose-coal accumulations along the mainline belt conveyor, he claimed that he had specifically called Strength and asked him to make a special inspection of the mai line belt conveyor (Tr. 37). The inspector testified that no one had made a complaint to MSHA with respect to loose-coal accumulations along the main conveyor belt (Tr. 1056; 1081). If a complaint as to the main conveyor belt had been made, the inspector would have had to have advised DOW of that fact when he reported to the mine because section 103(g)(1) of the Act requires MSHA to report to the operator that an inspection is being conducted in response to a complaint. Since Strength only went to the mine in connection with a complaint about the bridging out of the belt-head switch, there is no reason to be er made a complaint to MSHA about loose-coal the main conveyor belt.

Pay for Accompanying Inspector

Deel claimed that DOW discriminated against him because h was advised by Taylor, the mine foreman, that DOW would pay hi when he aocompanied the inspector in the face areas undergroun but would not pay him for coming outside the mine to meet the inspector and take him underground and would not pay him for

ime he accompanied the inspector, regardless of whether it or underground inspections or for being with the inspector e surface of the mine (Tr. 419; 842).

Deel, however, contends that he was given disparate treat- because DOW had always paid Fields, the other safety com- eman, when he accompanied the inspector. Therefore, Deel nds that just the threat by Taylor that DOW would not pay or accompanying the inspector on the surface showed dis- e treatment of him as compared with Fields. The preponder- of the evidence fails to support Deel's allegations. s testified that he was safety committeeman for about 4 as compared with Deel's 24 days as an active safety com- eman (Tr. 716). Fields said that he did not go out to the inspector and bring him underground and that he did ccompany the inspector on his trip out of the mine after d completed his inspection. Fields additionally testified if he were behind in his work as shot fireman, he would tell the inspector to let him know what he had found when s leaving and that he did not even accompany the inspector rground on such occasions (Tr. 724-725).

Inasmuch as Taylor advised Deel that DOW would pay him he accompanied the inspector in the face areas, but not e surface (Tr. 78), Taylor was treating Deel exactly as ad treated Fields in that Fields had been paid for accom- ng the inspector only when the inspector was making an rground inspection at the faces and DOW was planning to pay for the same portion of the time he spent accompanying the ctor. While Deel was entitled to be paid for the entire he spent with the inspector, Taylor was unaware of that until Inspector Strength advised him that DOW was required y Deel for the entire time he spent accompanying the in- or. Since Taylor immediately paid Deel upon being advised Deel had to be paid for all time spent with the inspector 419), and since Stiltner had never deducted a single minute me from Deel's attendance sheet for time spent accompanying nspector (Tr. 842), there is nothing in the record to sup- a finding that DOW engaged in disparate treatment in ad- g Deel that he would be paid only for the time he spent mpanying the inspector in the face areas of the mine because is exactly what DOW had done with respect to the previous rs' representative who had accompanied inspectors at DOW's

FMSHRC 1796 (1979), that operators have to pay miners for a
panying inspectors only when the inspectors are engaged in
ing one of the regular quarterly inspections required under
tion 103(a) of the Act. The Commission's decision was reve
by the District of Columbia Circuit in UMWA v. FMSHRC, 671
615, in a decision issued February 23, 1982. Since Deel te
fied in this proceeding during the week ending February 19,
he was technically incorrect in stating that he was require
be paid by DOW for accompanying an inspector who was engage
only in making spot inspections.

A final day of hearing was held in this proceeding on
April 26, 1983, but the Supreme Court did not deny petition
for certiorari with respect to the D. C. Circuit's reversal
the Commission's Helen Mining decision until October 10, 19
The matter of paying miners for spot inspections is still b
contested in current cases before the Commission. See, e.g
notice issued by the Commission on September 2, 1983, indic
that the Commission had declined to vote for the grant of a
petition for discretionary review of my decision issued Jul
1983, in Consolidation Coal Co. v. Secretary of Labor, Dock
No. PENN 82-221-R, in which I had held that Consolidation,
the D. C. Circuit's decision in the UMWA case, supra, had t
a miner who accompanied an inspector who was engaged in mak
spot inspection.

Inspection of Face Areas on May 5, 1982

It is a fact that Inspector Strength made a spot inspe
of the face areas and the beltline in DOW's mine on May 5,
and that inspection occurred just 2 days before Deel was di
charged on May 7, 1982 (Tr. 1040; 1060). The inspector rec
no unusual delay before beginning his inspection (Tr. 1047)
The inspector arrived at the mine about 8:30 a.m., called f
the miners' representative (Deel) to meet him on the surfac
spent about 30 minutes examining DOW's record books before
underground, took about 25 minutes in traveling to the work
section, and began his inspection in the No. 1 entry about
a.m. (Tr. 1069). On May 5 the inspector wrote three withdr
orders (Nos. 922773, 922774, and 922775) under section 104(
of the Act citing DOW for violations of section 75.316, 75.
and 75.1303, respectively (Exh. 1). Deel did not point out
violations to the inspector in his capacity as the miners'
resentative (Tr. 1091).

Deel thereafter claims to have advised both the mine fore
man, Taylor, and the section foreman, Stiltner, that Strength
was going to make an inspection of the face areas and that the
asked him to stall the inspector until they could improve cond
tions in the face area prior to the inspection (Tr. 25; 195).
Deel claims that when he advised Strength that they wanted him
to stall the inspection for a while, Strength stated, "If ther
that much wrong in there, there ain't no way they're going to
get it done; * * * let's give them their time" (Tr. 195-196).
For the foregoing reason, Deel said that "* * * we were about
half hour to an hour late going in" (Tr. 196).

As indicated above, the inspector stated that he inspecte
both the beltline and the face every time that he made a spot
inspection and he specifically stated that it was not possible
that he failed to check the face areas when he made any of the
spot inspections (Tr. 1040; 1060). Additionally, section 110(
of the Act provides for a fine of up to $1,000 and up to 6 mon
imprisonment as punishment for anyone "* * * who gives advance
notice of any inspection". There is no likelihood, therefore,
that the inspector would have stated, as Deel alleges, that
"* * * we'll give them advance warning" (Tr. 195) of the fact
that he was going to inspect the face areas.

When Deel was being cross-examined about his claim that h
persuaded the inspector to make an inspection of the face area
which he would not otherwise have made, Deel stated that he wa
so positive of the allegation, that he would lay his hand on t
Bible and swear on his mother's grave that the inspector had
come on May 5, 1982, only to check the beltline (Tr. 170). De
at first stated that he knew the inspector was coming on May 5
to make a follow-up examination to see if DOW had corrected sc
beltline violations previously cited and that he and everyone
else knew the inspector was coming only to check the beltline
(Tr. 128). The citations and orders in Exhibit 1, however, sh
that the inspector had written no citations requiring that vio
lations be abated by May 5, 1982. Deel later realized that he
could not specify an exact abatement date given by the inspect
and changed his testimony to say that the inspector had given
DOW an oral warning to get the belt cleaned up by a certain da
and had advised DOW's management that he would issue a citatio
or order if DOW had failed to clean up the belts by that time
(Tr. 166).

hang reflectors or warning devices outside the Nos. 1, 2, headings (Order No. 922774, Exh. 1). No section foreman as much experience as Stiltner had would ask for an inspe to be delayed until he could improve conditions at the fa then overlook the setting of temporary supports which car stalled in a very short period of time.

On the basis of the above discussion, I find that th ponderance of the evidence fails to support Deel's claim requested Inspector Strength to make a special inspection face areas on May 5. Since Deel failed to prove that he quested such an inspection, the evidence also does not su Deel's claim that his discharge was motivated because of having allegedly requested the inspection on May 5 which in the inspector's issuance of three unwarrantable failur

The Firing of Two Shots at Once

As has been shown in the preceding discussion, Deel panied the inspector during the spot inspection conducted May 5, 1982. Deel has arrogated to himself great credit inspector's having cited DOW for a violation of section 7 in Order No. 922775 which alleges that permissible explos were not being used in a permissible manner in the No. 7 and the crosscut right off the No. 7 heading because 24 c (12 in each place) were shot or detonated at the same tir 1). The inspector explained that DOW's shot-firing batte designed to detonate only up to 20 shots at one time and the violation consisted of DOW's shot fireman (Chann Fiel having detonated 24 charges simultaneously when, in fact, should not have detonated more than the 12 charges by mea a single discharge of electrical energy from the shot-fi battery (Tr. 1084).

Deel claims that when Strength found the wires runni the two headings tied in such a manner that they could ha fired simultaneously, Strength accused DOW of having shot places at the same time. Deel contends that Stiltner sta that they wouldn't do such a thing and asked Deel to agre him that the shots were fired separately, but Deel claims he replied "Tivis [Stiltner], I ain't going to lie for yo nobody else" (Tr. 26). Deel also alleges that Strength t that he might have to have Deel to testify in court in su of that alleged violation. Finally, Deel claims that St

this" (Tr. 1051), but Strength did not recall whether Deel
statement was made in reply to any statement or question b
one else. Additionally, Strength recalled that Stiltner s
that he was unaware that the condition existed (Tr. 1051).

Deel additionally alleged that he was "right over fro
Fields" when he fired the two shots at once and that he kn
his own knowledge that Fields shot both places at once (Tr
Deel, however, did not tell the inspector that he had seen
shoot both places at once (Tr. 1091). The inspector did n
call hearing Stiltner try to persuade Deel to agree with h
the places had been shot separately. Stiltner testified t
Strength rolled up the wires and took them with him as evi
in the event DOW contested the citing of a violation of se
75.1303 (Tr. 885). The inspector kept the wires until aft
had paid the proposed penalty for the violation and then d
carded the wires (Tr. 1053-1054). When the inspector aske
Fields if he had fired both places at once, Fields stated
they had been fired with separate cables, but the inspecto
Fields that he could not agree with Fields because of the
the wires were tied together (Tr. 1052).

Deel called Kyle Turner as a witness to corroborate D
contention that he had upset Stiltner by refusing to agree
Stiltner that the two places had been shot separately. Ky
claims to have walked by an intersection on May 5 and to h
seen the inspector, Stiltner, and Deel standing in a headi
heard Stiltner asking Deel to try to go along with Stiltne
claiming that the two shots were fired separately, but Tur
said that Deel refused, saying that the inspector could se
the physical evidence that both places had been fired at o
(Tr. 286). Turner, however, could not recall where he was
he heard the alleged conversation and could not recall wha
was doing (Tr. 287). Deel's counsel tried to establish on
examination that Stiltner was wrong in saying that Turner
engaged in setting temporary supports or safety jacks in t
4 heading during the time they were inspecting the No. 7 h
where the double shots were fired. Stiltner agreed that s
plies are stored in the vicinity of the No. 7 heading but
tinued to insist that Turner had no reason to be near the
where the double shots were alleged to have been fired (Tr

There are at least two reasons for doubting Turner's

merely stated that he was unaware that the conditions fo
the inspector existed. If Stiltner had engaged in an al
effort to persuade Deel to agree with him that the shots
been fired separately, the inspector would surely have r
Stiltner's efforts to persuade Deel to agree with him, y
inspector does not recall that Deel's remark about the e
of the wires was made in response to any question by any
1051). It is also highly unlikely that the inspector ev
to Deel that the inspector might have to call Deel as a
because the inspector was relying on the wires themselve
being all the evidence he needed to support his citing o
violation. Moreover, since Deel did not tell the inspec
he had seen Fields fire the two shots at once, the inspe
no reason to believe that Deel had any independent knowl
the manner in which the shots were fired other than the
evidence on which both Deel and the inspector were relyi
concluding that both shots had been fired simultaneously

Deel's credibility with respect to the firing of tw
at once is greatly eroded by other inconsistent statemen
he made when he testified before the Virginia Employment
sion and at the arbitration hearing. At the Virginia Em
Commission hearing, Deel gave the following account of t
firing incident (Tr. 44):

> A * * * and we went to Number 7 heading, and we fo
> it had been double-shot, which is a federal viol
> tion, and the jumper wires was wired on through
> there, and Bill said, look here, we have found o
> that has been double-shot. Tivis [Stiltner] sai
> no; he said, that was shot the same turbine (sic
> And he looked at him and said, now Tivis, you kn
> it's been double-shot. He said, here's your lea
> wires and everything, and Bill [Strength] looks
> me, and he said, now I want the truth; he said,
> what do you think about it? I said, well it's
> plain to see that places have been double-shot.
> He said, well I may have to call you for a witne
> when we have a trial, and he rolled the wires up
> and put them in his pocket as--you know, to show
> that the jumper cables were there. He took the
> cables and put them in his pocket for evidence.
> * * *

in response to a question asked by the inspector, whereas in this proceeding, he claimed that his remark was made in respons to at least two questions asked by Stiltner in an effort to get Deel to agree with Stiltner that the shots had been fired sepa- rately.

As to Deel's claim that he saw Fields shoot both places at once and knew of his own knowledge that Fields had shot the two places at once, Deel was read in this proceeding (Tr. 190) the following testimony from the arbitration hearing held on May 28 1982 (Tr. 72-73):

> A. I said, I just said anybody can see the evidence is there; they are wired together. I said I wasn't there when they was shot. I said it's plain to see the evidence is there they was both shot together; but I wasn't going to lie and say they was shot one at a time because I wasn't there. * * * [Emphasis supplied.]

Deel's explanation in this proceeding concerning the above inco sistent statements is as follows (Tr. 192):

> A Well, let me explain to you what I was meaning by that. I wasn't actually up there when he tied -- the inspector asked me if I was actually up there when he tied the cable from that cable to this cable. I wasn't actually up there, but I was over from Chann Fields when he mashed the trigger on it. I could -- half a break. I could see him and I could hear it. I wasn't right beside him. But what I was saying was I couldn't be an actual witness to him wiring them together because I wasn't there to see him wire them together; and what I mean by I was there, I was over from him, you know, I could hear him hollering fire, fire, fire, and I heard the shot go off when he pulled the trigger.
>
> I never did see him go back up in there and wire another one. I never did hear him yell fire, fire, fire and shoot nothing else over in there.
>
> Q Well, if you were that close by, wouldn't it have been obvious that he was shooting two places at once?

was telling the diffe
tion of the statements shows that he did tell two different
stories because he first stated that he knew of his own pers
knowledge that Fields had fired two places at once, but then
changed his testimony when confronted with his prior stateme
in the arbitration hearing to state that he "couldn't swear"
that Fields had fired two places at once. Yet, that is exac
what he had done during his direct testimony in this proceed
sworn under oath that he knew of his own personal knowledge
Fields had fired two places at once.

In the application which Deel filed on May 21, 1982, wi
MSHA, he alleged that "I told Tivis not to shoot two places
the same time in No. 7, but he did anyhow." When Deel was a
about that claim during cross-examination, he stated that he
might have made that request on May 5 and that may be the re
that he recalls that two places were shot at once (Tr. 122)
is highly unlikely that Deel even knew it was a violation p
to May 5 that the mandatory safety standards prohibit the sh
ing of two places at once because he had previously worked w
Randy O'Quinn on the evening shift and O'Quinn testified tha
they sometimes fired three places at once (Tr. 261).

Other reasons for doubting that Deel ever brought the
ing of two shots to Stiltner's attention are: (1) Deel was
called out of the mine at 8:30 a.m. to accompany Strength d
ing his inspection of the mine on May 5. If Deel had asked
Stiltner not to shoot two places at once before he came out
the mine, that would have been foremost in his mind when he
turned underground with the inspector and Deel would have c
the shooting of two places at once to the inspector's atten
but the evidence shows that it was the inspector who found
wires and concluded that two places had been shot at once.
No shots were fired after Strength began his inspection of
face area. Therefore, if Deel had asked Stiltner on May 5
to fire two places at once, his tendency to brag about his
safety-related activities would have compelled him to tell
inspector that he had asked Stiltner not to fire two places
ence before he left the face area to come outside for the p
pose of accompanying Strength during his inspection.

On the basis of the discussion above, I find that the
ponderance of the evidence shows that Inspector Strength wa
the sole person who discovered evidence leading to a conclu
that Fields had fired two places at once. Since Deel plave

motivated DOW to discharge Deel on May 7, 1982, or 2 days after the inspector had cited DOW for the violation of section 75.1303

Stiltner's Alleged Threat

Deel claims that on May 6, 1982, the day after the order had been written citing DOW for shooting two places at once, that when the miners were getting into the mantrip to go outside the miners were kidding Stiltner about the fact that Deel had re fused to lie for him so that the inspector would not cite a vio- lation, Stiltner is alleged to have looked at Deel and said, "I'll make you pay for this one" (Tr. 27; 120). Deel said that he figured Stiltner just meant that he would work Deel hard, lik having him drill and roof bolt by himself, but instead Stiltner fired him the next day, May 7.

Stiltner denies having made such a statement (Tr. 836) and Fields testified that he did not hear Stiltner make such a state ment (Tr. 723). On the other hand, both Randy O'Quinn and Kyle Turner claim to have heard Stiltner's alleged threat (Tr. 220; 288).

I believe that Stiltner's denial of having made the threat is more credible than Deel's claim because the inspector stated that all Stiltner said in response to the inspector's allegation that two places had been shot at once was a statement that he was unaware that the condition found by the inspector existed. It was just as obvious to Stiltner that the wires spoke for themselves as it was to the inspector and about the only denial Stiltner could have made was that he was unaware of the fact that the wires had been connected so as to support a conclusion that two places had been shot simultaneously. Deel gave incon- sistent accounts, as indicated on pages 23-24, supra, about his personal knowledge of what had happened. Stiltner would have had no reason to threaten Deel about his part in bringing about the issuance of Order No. 922775 (Exh. 1) because Stiltner knew that the inspector had found the alleged violation by himself and had taken the wires as evidence that the violation had oc- curred. Nothing Deel could have said would have changed the inspector's belief that a violation occurred and there was no reason for Stiltner to have been carrying any special ill will toward Deel for the fact that the inspector had cited DOW for a violation of section 75.1303.

Deel claims to have irritated management by
plaining about the fact that DOW failed to maintain curtains as
close to the face areas as he thought was required and for fail-
ure to apply rock dust as close to the face as Deel thought was
required (Tr. 9; 12). The evidence shows that Deel operated a
scoop at times and Deel conceded that he personally knocked down
curtains at times and sometimes he would just tell the "curtain
man" he had knocked the curtain down so that the curtain man
could rehang the curtain (Tr. 63; 67). Deel also conceded that
the "curtain man", Darrel O'Quinn, had threatened to hit him in
the head with a hammer if he drove through a curtain which was
not intended as a travelway for the scoop (Tr. 64-65). While
Deel contended that the confrontation with Darrel over Deel's
running through the curtain occurred shortly after Deel had been
recalled and that Deel was not familiar with the layout of the
mine at that time since they were developing a different area of
the mine from the one in which he had been working when he was
laid off in 1981 (Tr. 65), the fact remains that DOW was using
the same seven-entry mining system when Deel was recalled in 19
that was being used in 1981 when Deel was laid off. Deel claim
to have been an experienced miner and should have familiarized
himself with the travelways being used for scoops before he got
on a scoop to operate it. Deel also agreed during cross-examin
tion that DOW's position as to the hanging of curtains was rea-
sonable and that DOW had had so much trouble with the miners
knocking down curtains that DOW had had to assign one miner,
Darrel O'Quinn, to the job of hanging and maintaining the cur-
tains (Tr. 200). Neither Deel nor O'Quinn was able to explain
why DOW would have gone to the expense of assigning a miner to
the sole job of hanging curtains and would then have refused to
supply curtains, as alleged by Deel (Tr. 12, 68; 937).

While Randy O'Quinn supported Deel's claim that DOW did no
maintain the curtains as required by the mandatory safety and
health standards, O'Quinn admitted that he personally failed to
maintain the curtain at the required distance from the face whe
cold weather prevailed because the cold air made him uncomfort-
able (Tr. 938). O'Quinn also conceded that when he was failing
to maintain the curtain at the required distance from the face,
he was necessarily relying entirely on the methane monitor to
safeguard him from encountering a hazardous concentration of
methane (Tr. 939).

Deel also contended that he complained to DOW's management

ock dust in a way which would have motivated DOW to discharge him for that reason.

I believe that if Deel had complained to the mine foreman and the section foreman about their failure to hang curtains and heir failure to rock dust, they would have explained to Deel hat he was in error about his contentions as to how close to th face rock dust has to be applied. Yet, the evidence clearly sho that Deel did not understand the regulations and argued with me on the record as to the meaning of section 75.402, contending that DOW was required to apply rock dust to within 35 feet of th working face and that section 75.402, which requires rock dustin only to within 40 feet of the working face, is inapplicable to DOW's mine (Tr. 201).

Deel, unfortunately, cannot read well enough to understand the citations, orders, and regulations to which he was exposed a safety committeeman and the miners' representative to accompan inspectors pursuant to section 103(f) of the Act (Tr. 75). Deel testified that the inspector mailed copies of the citations and orders he issued to Deel at his home address and that he had his wife read the contents of the citations and orders to him (Tr. If Deel did have his wife read the language on the citations and orders to him, he did not understand what was being read to him because Citation No. 922767 makes it clear that section 75.400 is enforced only to within 40 feet of the face. Deel also was uncertain as to how close to the faee the line curtain must be aintained (Tr. 69). The inspector stated on the termination sheet accompanying Order No. 922764 that DOW's ventilation, ethane, and dust control plan requires DOW to maintain the line curtain to within 10 feet of the working face (Exh. 1).

On the basis of the discussion above, I find that Deel fail to become acquainted with the mandatory health and safety stand- ards sufficiently to be effective in his role as safety committe an and that his complaining about curtains and rock dust appli- cations were not likely to have been of sufficient concern to DOW's management to cause them to want to discharge him because he may have mentioned the lack of curtains and failure to rock dust on a few occasions.

There are other aspects about Deel's alleged complaints about failure to erect curtains, apply rock dust, and clean up loose coal which are less than convincin . For example, Deel

jacks, or temporary supports, because it took too much time to set them (Tr. 126).

Taylor, the mine foreman, claims that he ordered Stiltner to have Deel set temporary supports on at least one occasion when he saw Deel installing roof bolts without using them (Tr. 423; 844). Taylor also stated that the miners were not using safety jacks when he became mine foreman and that that was one of the areas in which he tried to improve safe mining practices at the mine (Tr. 421-423). Stiltner testified that the miners objected to erecting safety jacks when he ordered them to do so. He said that when they asked him if they would be fired for not setting them, he told them he would not fire them for failing to set them, but he would have to give them time to do so and would have to see that they worked safely (Tr. 844). It is not likely that miners would ask if they could be fired for failing to install safety jacks unless they had a propensity for preferring to ignore the requirement for setting safety jacks. Consequently, it is just as likely that safety jacks were not being set because that was the miners' preference as much as it was that Stiltner had told them he would prefer that safety jacks not be set, as claimed by Deel (Tr. 126).

If Deel had been the aggressive safety committeeman that he contends he was, he would have had an ideal situation for calling an MSHA inspector to get it established that the setting of safety jacks is required by DOW's roof-control plan. Deel contends, without record support as indicated above on page 14, supra, that he called Inspector Strength to ask for a special inspection when the belt-control switch was bridged out, and he contended that he called Inspector Strength to ask for a special inspection as to loose coal accumulations along the belt line (Tr. 36). There is hardly any explanation for Deel's failure to insist on setting safety posts, if he had really been instructed not to do so, other than the simple fact that he was too lazy to bother with setting them himself and brought up the matter of DOW's failure to require the setting of safety posts as just one more contention about his alleged safety-related complaints.

In his complaint filed with MSHA on May 21, 1982, Deel stated "* * * I asked Tivis [Stiltner] to have Chann to pull the curtain 30 feet out the face before he shot the coal. Tivis said that Chann didn't ave to. That

said that in 1981 DOW asked MSHA for a variance in its venti-
tion plan which would permit them to set the curtains back
t of the way prior to detonating the shots so that the cur-
ins would not get torn or knocked down by the explosives.
HA denied the request (Tr. 366-367).

Deel's allegation that he asked Stiltner to have the cur-
in moved back 30 feet before blasting shows that he did not
derstand the reason for having the curtain close to the face.
xious fumes, methane, and dust are very likely to accumulate
the working face immediately after explosives are detonated.
is safer for the miners to have a damaged curtain hanging as
ose as possible to the face after a shot is detonated, than
have the curtain removed 30 feet from the face before the shot
detonated. A damaged curtain will remove some dust, noxious
mes, and methane, but a curtain which is 30 feet outby the
ce will have no ability whatsoever to sweep dangerous accumu-
tions from the working face.

The above discussion shows that Deel was simply uninformed
to what the safety and health regulations were. Management
cessarily had to deny some of his complaints about safety, if
ey were made, because he was asking management, at least part
the time, to violate the safety and health standards and to
rform acts which were not required by its ventilation plan.
such circumstances, it cannot be successfully argued that DOW
uld have discharged Deel because he was making safety complaints

Additionally, Deel's condemnation of DOW's management is
consistent like all his other allegations in this proceeding.
r example, Deel testified that when he was first elected as
fety committeeman, DOW's management cooperated with him and
ovided him with all the supplies he wanted to make the mine
fe. Deel states that, as a result of DOW's cooperation, the
e received no citations of violations during the first in-
ection which occurred after he became safety committeeman (Tr.
9, 431).

It is correct that Inspector Strength did not write any
tations during the first inspection he made after Deel became
fety committeeman, but Deel was elected safety committeeman
Saturday, April 3, 1982, and Deel's first day at the mine as
fety committeeman occurred on Monday, April 5, 1982. The
e " inspection m de b th i s ector on April 5 and April 6,

The effect of Deel's having claimed that DOW's management, when he was first elected committeeman, cooperated with him and provided him with all the supplies he needed to make the mine safe, leaves Deel in the position of having indicated that DOW management was interested in operating a safe mine on or about April 5, 1982. Deel was the safety committeeman for 32 calenda days prior to his discharge and only actively performed the duties of a safety committeeman for a period of about 20 days, as indicated on page 11, supra. Deel has not established that he actually did anything after April 5 which would have changed DOW's position regarding safety within a period of 32 days so drastically that DOW would have wanted to discharge its safety committeeman just because he had tried to make the mine safe. As will hereinafter be shown, it was Deel's failure to do his job properly which caused him to be discharged--not his alleged protected activity under section 105(c)(1) of the Act.

Deel's Allegations of Disparate Treatment

Deel testified during his direct testimony and cross-examination (Tr. 42; 48) that he had not refused to perform a work order and that he did not know of anyone else who had ever refused to perform a work order. Randy O'Quinn testified, however, that he had refused to perform work orders and that Deel "thought it up" and had his attorneys ask O'Quinn about it (Tr 273). The nearest O'Quinn ever came to refusing a direct orde was one time when he was working for Jim Deel (who is not rela to complainant (Tr. 353) and who was a section foreman). On t occasion, O'Quinn refused to watch the belt drive and said he going home if that was all they had for him to do. He alleges that when he went outside at that time to hang up his light, Taylor, the mine foreman, asked him where he was going and per suaded him to go back into the mine to work on an extension of the water line (Tr. 912). O'Quinn also claims to have refused perform work orders given by Stiltner, such as refusing to run the drill, and that Stiltner would undertake to drill a few ho and would feign that the drilling was hurting his back and O'Quinn would then take over and go ahead with the drilling (T 910-911). The only time O'Quinn ever claimed to have refused perform a work order, without changing his mind and doing the work after having said he would not do it, was in connection w the aforesaid incident of watching the belt drive, and even in that case, he relented and returned underground to perform alt

ack to work, as he claimed (Tr. 226). Therefore, the record oes not support Deel's claim that Stiltner allowed other miners o refuse to perform work orders without disciplining them, hereas Stiltner discharged Deel for refusing to perform a work rder.

Kyle Turner stated at the arbitration hearing that he be- ieved Stiltner treated all the miners on his crew alike (Arb. . 122). Although Turner had some difficulty in answering a uestion about Stiltner's equal treatment of the miners when he estified in this proceeding, he ultimately conceded on cross- xamination that his statement made at the arbitration hearing as correct (Tr. 297-300). When Turner testified on redirect xamination of his rebuttal testimony, however, he was finally ersuaded to state that he thought Deel was treated "a little ifferent from the rest of the men" (Tr. 1000), but that change f opinion was elicited from him after several admissions to the ontrary.

The different treatment Turner appears to have been refer- ing to would apparently have been Turner's allegation that tiltner had at times assigned Deel to run the coal drill which nvolves considerable manual labor (Tr. 342). Turner stated hat Stiltner always told them on such occasions to bolt the laces as fast as they could just to make Deel work hard (Tr. 26; 973), but Turner subsequently said that he still switched obs sufficiently to avoid making it "that hard" on Deel (Tr. 43). Turner also conceded that he rarely had to work on the ame roof-bolting machine that Deel was assigned to operate (Tr. 87-988).

O'Quinn also testified that when Deel was working on the ight shift prior to the time Deel was laid off in 1981 for conimic reasons, that Stiltner once granted Deel's request hat he be permitted to work at the face, instead of at the tail iece where he was normally assigned to work. On that occasion, tiltner told O'Quinn to make Deel do all the drilling, but 'Quinn also admitted that he had a miner named Mack Lester help ng him and that Lester liked to drill and did all the drilling, o that the way they made it "hard" on Deel was that they just orked faster than usual so that they were able to bolt and dril 0 places that night instead of eight (Tr. 964-966).

O'Quinn additionally stated that Stiltner, in those days,

certainly as hazardous as it was for Chann Fields to haul sives on his tractor. Yet Deel does not claim that he or else ever pointed out to DOW's management that hauling pow the roof-bolting machine was an unsafe practice.

In order for Deel to prove that DOW discriminated aga him, he must show that he was treated differently from the miners because of some activity protected under the Act, b has been unable to show that his different treatment, if a anything whatsoever to do with safety-related activities. ner testified that he discharged Deel on May 7 because he had it" with him (Tr. 810).

The record shows that Deel engaged in activities whic in no way protected under the Act and in conduct which wou necessarily cause a supervisor to want to assign him to ta that would make it unnecessary for the supervisor to come tact with him. For example, Stiltner testified that one r when Deel was working on the night shift, also before he w ever laid off in 1981 for economic reasons, that the elect power kept going off at the main power source and Stiltner not determine what was causing the power interruptions. F one of the miners told Stiltner that Deel was sitting behi rectifier kicking the power off. Stiltner said that he we the power source and found Deel sitting behind the rectifi Stiltner stayed at the rectifier for an hour or longer and power never did go off any more after that. Stiltner stat that after Deel was called back to work in 1982, Deel admi under questioning by Stiltner that he had been knocking th off, but he said that Stiltner could not prove it and coul do anything about it (Tr. 845-846). Deel made no attempt but Stiltner's allegations about his power-interrupting ac ties.

In my opinion, if any other miner had been as obstina bout doing the work assigned to him by his foreman as Deel on May 7, Stiltner would have taken the same action agains miner that he did in connection with Deel's failure to ope the scoop. I find that the preponderance of the evidence to support Deel's contentions that he was treated differen from other miners because of his safety-related work as sa committeeman or because of any other activity protected un the Act.

tner checked the face area and found that Deel was not doing
ning and had only drilled holes in one heading. Stiltner
d Deel what was wrong and Deel told Stiltner that installing
bolts and running the drill were too hard for one man to do
that he was not going to do both jobs. Stiltner advised Deel
his response left Stiltner with no alternative but to take
outside for purposes of discharging him. As Stiltner and
were passing the loading point in a scoop, Deel asked to
to his committeeman, Kyle Turner, who was at the loading
t. After a discussion between Turner and Deel, Turner asked
tner to put Deel back to work as Turner did not think Deel
refused to perform both jobs. Stiltner asked Deel if he
d do his job if he put him back to work and Deel said he
d. Therefore, Stiltner allowed Deel to return to the roof-
ng machine. Stiltner said that he went to check on Deel a-
10 minutes later and Deel had still not started installing
bolts. Therefore, Stiltner ran the roof-bolting machine for
remainder of the day so that Deel would only have to operate
drill (Tr. 820-821).

Deel's story in this proceeding about his having to drill
and install roof bolts on the same day differs from Stilt-
only in that Deel contends that he had already drilled
or four places before Stiltner found him resting long
gh to get his breath before going into a new place (Tr. 117).
also claims that Stiltner "hollered" at him to get moving
he meant right then. Deel says that when he told Stiltner
Stiltner could make him do the work, but could not make him
at it, Stiltner told him he was fired and started taking
out of the mine in the scoop, but Stiltner stopped so that
could talk to Turner who persuaded Stiltner to put Deel
to work (Tr. 117-118). Deel also agrees that Stiltner ran
roof-bolting machine for the remainder of the day so that
only had to operate the drill for the rest of the shift
120).

Once again Stiltner's version of the incident is more cred-
than Deel's because Deel endeavored to justify his position
laiming that he had already drilled three or four places be-
Stiltner asked him to get to work (Tr. 117). It is neces-
to bolt the top before drilling is done at the face (Tr.
Several witnesses, including Deel, have testified that
akes 15 minutes to install roof bolts without using tempor-
supports and that it takes at least 10 minutes to drill 10

bolting machine and drill (Tr. 133, 187, 193). Therefore, it i
quite unlikely that Deel had been working for as much as an hou
before Stiltner asked him why he was not working. In an hour's
time, he would not have been able to install roof bolts and dri
in three or four places before Stiltner asked him why he was no
working. Stiltner was upset because Deel had drilled only one
place before Stiltner found him doing nothing. There is no rea
son to believe that Stiltner would have been upset if he had
actually drilled three or four places before Stiltner found him
"resting".

At the Virginia Employment Commission hearing, Deel testi-
fied that he had been running both the roof-bolting machine and
doing the drilling by himself for almost 3 days before Stiltner
started to discharge him (Emp. Com. Tr. 41), but in this pro-
ceeding, he claimed that he had been assigned to do both types
of work only "that morning" (Tr. 115). Stiltner testified that
other miners, such as Turner, had been assigned the dual jobs o
installing roof bolts and operating the drill (Arbitration Hear
ing, Tr. 8).

Regardless of whether Stiltner was unduly critical of Deel
ork efforts on the day he almost discharged Deel, the fact re-
mains that Deel was involved in a confrontation with his forema
which caused the mine committeeman to think it was necessary to
explain to Deel that he could not refuse to perform a work orde
(Arb. Hearing Tr. 70). Moreover, Deel testified at the arbitra
tion hearing that he was aware of the fact that he was required
under union rules to carry out a foreman's instructions and sub
sequently file a grievance if he felt that the work order was
unreasonable (Arb. Hearing Tr. 96). Deel's statement that he
replied to Stiltner's order for him to get to work by saying th
Stiltner could make him work but couldn't make him "run" at it
as argumentative and was equivalent to saying that he would
work as slowly and do as little as he found it convenient to do

Stiltner's willingness to abort his trip out of the mine
after the mine committeeman's appeal that Deel be given another
hance to do his job shows that Stiltner was not unreasonable i
his demands of his employees and, in fact, Deel admitted during
cross-examination that he thought Stiltner was "fair" in perfor
ing his supervisory duties (Tr. 120). There is nothing about
eel's near discharge for failing to perform the jobs of roof
bolting and drilling which indicates that DOW would have discha

coal drills operated from hydraulic power supplied by the roof bolting machines (Tr. 181). Two miners were assigned to each roof-bolting crew. Normally, one of the miners would operate the roof-bolting machine and the other would operate the coal drill, but often the miners would swap jobs so that each one would engage in an equal amount of coal drilling which involve more actual manual labor than operating the roof-bolting machi (Tr. 117; 184; 342; 708-710). When the normal crew of men was available, Billy Deel and Kyle Turner were considered the oper ators of the roof-bolting machines (Tr. 275). Lee Grizzle was assigned to operate the coal drill attached to Turner's roof- bolting machine and Randy O'Quinn was assigned to operate the coal drill attached to Deel's roof-bolting machine (Tr. 162; 987). Chann Fields was the shot fireman, Floyd O'Quinn was on of the operators of a scoop, and Darrel O'Quinn was assigned a curtain man to install ventilation curtains at the face and ou by the face (Tr. 806-807). Darrel O'Quinn was off in May of 1982 and Stiltner, the section foreman, was short a scoop oper ator because of absenteeism (Tr. 680). A miner by the name of Clayton Justice had been hired as a prospective section forema on April 19, 1982, on the assumption that DOW would be able to open another section in the mine (Tr. 679; 705). Justice had not operated scoops as they were used in DOW's mine and had no operated a roof-bolting machine like the ones used in DOW's mi but he was competent as an operator of a coal drill (Tr. 771; 775; 782). Justice was assigned to operate the coal drill at- tached to the roof-bolting machine which was normally operated by Deel and Randy O'Quinn (Tr. 788). Deel and Randy O'Quinn were also experienced operators of a scoop and, for that reaso they had been asked to alternate between the jobs of operating the scoop and operating the roof-bolting machine (Tr. 124; 186 773; 792; 801). The above-described arrangement required that on the days when O'Quinn was assigned to the roof-bolting machine, Justice did the drilling. Likewise, when Deel was assigned to the roof-bolting machine, Justice did the drilling Tr. 785; 788).

Deel's discharge on Friday, May 7, 1982, occurred because he insisted on operating the roof-bolting machine despite the fact that his supervisor, Stiltner, wanted him to operate a scoop and haul coal from the working faces to the conveyor bel (Tr. 773; 809-810). About half of the testimony in this pro- ceeding was devoted to listening to Deel's, O'Quinn's, Justice Stiltner's, Taylor's, Fields', and Turner's versions of the in

ing. Deel's failure to give in his direct testimony a complete running account of his version of the incidents of May 7, 1982, requires one to collect his version of those events from various places throughout his cross-examination.

If all the statements made by Deel during cross-examination redirect examination, recross-examination, and my examination ar pieced together, Deel's version of the events is as follows: On May 7, 1982, Deel was asked by Stiltner to get a scoop and use it to pull the mantrip into the mine (Tr. 100). After Deel arrived at the working section, he delivered the miners to their orking places, unhooked the mantrip, and proceeded on the scoop to "his" roof-bolting machine (Tr. 102-103; 125; 173). Although Randy O'Quinn and Clayton Justice were already at "his" roof-bolting machine when Deel arrived, the fact that two miners were there did not have any significance to Deel because Justice was getting something to eat out of his lunch bucket which was carried on Deel's roof-bolting machine (Tr. 183). Additionally, Justice had been assigned to drill from Deel's roof-bolting machine before May 7 and Justice, Deel, and O'Quinn would just swap jobs and work together (Tr. 184). There was no significanc to Deel that Justice asked Deel what job he was planning to do that day because, when Deel told Justice that he was planning to operate the roof-bolting machine, Justice said only that he guessed he would operate the scoop (Tr. 185).

Justice, after saying he guessed he would have to operate the scoop, got on the scoop which Deel had parked near the roof bolter and left. In a little while, Justice returned and stated that Stiltner, the mine foreman, wanted Deel to run the scoop that day and wanted Justice to run the coal drill hooked to the roof-bolting machine. Deel's reply to Justice's message from Stiltner was that if Stiltner wanted Deel to run the scoop that Justice should go back to Stiltner and tell him to come to the roof-bolting machine in person and tell Deel what he wanted Deel to do. Justice left again on the scoop and returned on foot a little while later (Tr. 172-173). Deel, upon Justice's second appearance, asked Justice what the story was now and Justice told him that Stiltner said he would be up there to talk to Deel "in a minute" (Tr. 187).

Stiltner soon thereafter rode to Deel's roof bolter on a scoop and Deel claims that the first thing he said to Deel when he arrived was "to get my goddamned ass in the buggy." Deel

eel said that after Stiltner started out of the mine with
im and O'Quinn in the scoop's bucket, Deel asked Stiltner
or four times to stop so that Deel could talk to his safety
teeman, Kyle Turner. Deel says that Stiltner finally
d and a discussion ensued during which Turner asked Stilt-
give Deel another chance since, as Turner understood the
, Deel had not refused to operate the scoop. Deel claims
tiltner calmed down a lot and asked Deel if he were to put
ck over there, would Deel run coal and Deel said he would.
hinks that Stiltner would have allowed him to go back to
f, about that time, Chann Fields had not spoken up and
"There ain't no damn use arguing with him any more. Take
e hell on out (Tr. 114)." Whereupon, Deel says that Stilt-
ld Deel and Turner both to get in the scoop's bucket and
ld take both of them outside. Deel additionally claims
tiltner did not want O'Quinn to be a witness to the conver-
he was having with Turner and Deel and ordered O'Quinn to
k to work and O'Quinn got out of the scoop's bucket and
ack to the roof-bolting machine (Tr. 114-115).

tiltner's version of what happened on May 7, 1982, is as
s: Stiltner says that he explained to Deel before they
nto the mine that he was short a scoop operator that day
at he would take the little scoop in and try to operate it
f along with doing his supervisory duties and that he
Deel to get the big scoop and pull the mantrip in with
he reason Stiltner had the discussion with Deel about the
" and "big" scoops was that Stiltner had had some stomach
s associated with internal bleeding and he had found that
ld be more comfortable in the little scoop than he could
big one. Stiltner stated that Deel also wanted to take
ttle scoop and it was necessary for Stiltner to insist
eel use the big scoop (Tr. 807; 857).

hann Fields rode into the mine with Stiltner in the little
nd all the other miners went underground in the mantrip
by Deel. Stiltner let Fields off at his tractor used to
he explosives wagon and Stiltner then drove the little
to the belt tailpiece where Stiltner needed to make some
s. While Stiltner was working on the belt, Clayton Justice
see him riding on the big scoop which Deel had used to
he mantrip into the mine. Justice told Stiltner that Deel

old Justice to park the big scoop and go back and tell Deel hat he would be up there in a few minutes (Tr. 808).

Stiltner says that he got in the little scoop a short time later and drove over to the roof-bolting machine where he asked Deel what his problem was and Deel stated that he did not have any problem. Stiltner then asked him why he wouldn't run the scoop and Deel said that he wouldn't run the scoop and let somebody else do his job. Stiltner then told Deel "to either get on his scoop or get in the bucket" (Tr. 809). Deel then came toward the scoop's bucket. At that time, Stiltner looked at O'Quinn and asked him why he was not working and O'Quinn said he needed an auger barrel for the drill. Stiltner told O'Quinn to go get one, but O'Quinn said that he was sick--had an earache or something like that--and was going to the house. O'Quinn then got into the scoop's bucket with Deel and Stiltner started outside with both of them (Tr. 809).

After they had gone about two breaks, Deel wanted to stop and talk to the committeeman, Kyle Turner. Stiltner stopped the scoop and Deel got out and went to talk to Turner. O'Quinn, according to Stiltner, decided he felt like working and went back to the roof-bolting machine. After Turner and Deel had talked for a few minutes, both of them came over to Stiltner who was still sitting on the scoop. Turner asked Stiltner what the problem was and Stiltner says he explained to Turner that Deel had told him that he was not going to run a scoop and let someone else operate his roof bolter. Stiltner claims that Turner asked him twice to put Deel back to work and Stiltner refused both requests, saying that "he had had it with" Deel and was taking him out (Tr. 810). Stiltner alleges that he then told Turner that he would do even better than taking Deel out and would take Turner and Deel both out so they could all talk to the mine foreman, Taylor.

Chann Fields, who had already returned with the auger barrel which O'Quinn had asked him to obtain, was listening to the discussion in which Stiltner, Turner, and Deel were engaged. Fields needed to obtain an explosives-shooting battery from outside the mine and, feeling that the discussion was at an impasse at this point, spoke up and said that if Stiltner was going out, he would like for Stiltner to bring him a shot-firing battery when he returned. Turner, Deel, and Stiltner all say, however, that Fields began his statement by saying, "There ain't no use

825). Fields denies that he stated anything about there not be ing any use to argue and that Stiltner should go ahead and take Deel outside, but he agrees that he did ask for Stiltner to bri him a shooting battery (Tr. 749; 758).

Regardless of whether Fields influenced Stiltner's decisio all witnesses agree that Turner and Deel got into the scoop's bucket and were taken outside by Stiltner. There is no need in giving a detailed discussion here of what occurred on the surfa of the mine as those facts are not contested by the parties, ex cept in very minor details, and are summarized in Finding Nos. 17 and 18, supra.

As indicated above, Clayton Justice was the miner who car- ried Deel's statements to Stiltner and Stiltner's replies back to Deel. Justice was also present when Stiltner returned from working on repairing the conveyor-belt tailpiece to find out wh Deel would not run the scoop. Justice's version of the actions and statements leading up to Deel's discharge is as follows: Justice began working for DOW on April 19, 1982, and O'Quinn wa on sick leave at that time. Justice had run a coal drill prior to being hired by DOW (Tr. 771). Therefore, Justice was asked to run the coal drill which received its hydraulic power from the roof-bolting machine normally operated by Deel. Consequent ly, on his first day at the mine, Justice worked with Deel. DO did not have enough scoop operators when Justice first began working there. As a result, when O'Quinn and Deel were both present at the mine, O'Quinn and Deel alternated jobs so that every other day Deel ran a scoop while O'Quinn operated the roo bolter and when O'Quinn ran the scoop, Deel operated the roof bolter. Justice was the drill man regardless of whether Deel or O'Quinn was the operator of the roof-bolting machine (Tr. 78 Justice knew how to run a scoop, but had never used one to haul coal in DOW's mine (Tr. 785).

Deel was hurt about April 22 when he was thrown to the front of a scoop while he was riding in a scoop operated by Web Bailey (Tr. 189; 873). Deel returned to the mine to work on May 3, 1982 (Exh. L). The mine was closed by Inspector Strengt on May 5, 1982, and was not released from the withdrawal orders until May 6, 1982 (Tr. 825; 831). Since Justice had been oper- ating the drill on a rather continual basis, he assumed he woul be running the drill on May 7, the day of Deel's discharge. Co sequently, Justice spen t e time just rior to going undergrou

Justice took his bits and went to the roof-bolting machine
rom which he normally drilled. Shortly thereafter Deel pulled
o to the roof bolter in the scoop and came over to the roof bo
ustice asked Deel what he intended to do and Deel said that he
as going to run "his" roof bolter. Clayton replied that he as
umed that meant that he would have to run the scoop to which D
aid "I guess so" (Tr. 772). Clayton felt that since Deel had
een working for DOW longer than he had, that he had no reason
rgue with him, but Justice was also uneasy about starting to r
he scoop without making certain that Stiltner wanted him to ch
obs (Tr. 794), so Justice got on the scoop which had been park
y Deel near the roof bolter and drove it about 120 feet, or tw
reaks, to the tailpiece where Stiltner was working (Tr. 795-79

When Justice explained to Stiltner that Deel said he was
oing to operate the roof bolter and asked Stiltner if he wante
ustice to run the scoop, Stiltner replied by requesting Justic
o go back to the roof bolter and tell Deel that Stiltner wante
eel to run the scoop and wanted Justice to drill coal. After
ustice had returned to the roof bolter and had relayed Stiltne
essage to Deel and had received Deel's retort that Deel was go
ng to run "his" roof bolter and for Stiltner to come in person
nd tell Deel what he wanted him to do, Justice went back to th
ailpiece and told Stiltner that Deel was insisting on running
he roof bolter. Stiltner then told Justice to park the scoop
nd go back to the roof bolter and that he would come and talk
eel after he had finished his repairs at the tailpiece (Tr. 77

Justice went on foot back to the roof bolter and told Deel
hat Stiltner would be up there and talk to him in a few minute
stice then sat down and waited for Stiltner to appear. Accor
g to Justice, Stiltner came to the roof bolter in a few minut
d asked Deel why he wouldn't run the scoop. Deel wanted to
ow what Stiltner meant by that question and Stiltner explaine
hat he was asking Deel to run the scoop because he believed th
eel was more familiar with the scoop than Justice and that mor
oal could be produced with Deel as the scoop's operator than
ould be produced with Justice as the scoop's operator. Stiltn
en told Deel that if he was not going to run the scoop, to ge
n the scoop's bucket and Deel got into the bucket (Tr. 773; 79

As Justice recalls the events, Stiltner's conversation wit
eel had been completed before Stiltner turned to O'Quinn to fi
t why O'Quinn was doing nothing. Stiltner then ordered O'Qui

ask Stiltner why Fields could not go after an auger barrel on the tractor (Tr. 1017). Assuming that Justice's rebuttal testimony is correct, he was still unable to explain how Stiltner would have known O'Quinn needed an auger barrel if O'Quinn had not told him that he was not drilling because of a lack of an auger barrel (Tr. 1019).

Randy O'Quinn was the other miner present during Justice's and Stiltner's conversations with Deel on May 7, 1982. O'Quinn testified at the arbitration hearing held on May 28, 1982. O'Quinn's testimony at the arbitration hearing supports in nearly every detail Stiltner's and Justice's versions of the events leading up to Deel's discharge, but in this proceeding O'Quinn's testimony shows that he was trying very hard to support only Deel's version of the events of May 7 (Tr. 222-229). During cross-examination by DOW's counsel, O'Quinn stated that what he said at the arbitration hearing was closer to the time the event occurred than his testimony in this proceeding was and would be likely to be more correct than his testimony in this proceeding which was given on February 15 and 16, 1983 (Tr. 253). Subsequently, the following colloquy occurred (Tr. 271):

> Q Do you think that anything you said at the arbitration hearing was wrong?
>
> A No, because that was closer to the time. I'd say it would be more right than what I could tell you today, because that long ago I can't remember every word. I just remember patches.

In view of the above statement by O'Quinn, I am relying upon his testimony in the arbitration hearing for the purpose of determining his version of the events leading up to Deel's discharge.

According to O'Quinn, Stiltner ordered Deel to get the scoop and pull the mantrip into the mine. Deel pulled the mantrip into the mine as ordered and parked the mantrip at its accustomed place. Then Deel drove the scoop to the site where Justice and O'Quinn were beginning to prepare the roof-bolting machine and drill for work. When Deel came close to the roof bolter, Justice asked Deel what job he was planning to do and Deel replied that he was going to bolt the roof, so Justice got on the scoop which Deel had driven to the roof bolter and left. After a while, Justice returned and told Deel that Stiltner

to park the roof bolter and Stiltner replied "No" (Arb. Tr. 101).

O'Quinn recalls that Stiltner then turned to O'Quinn and ordered him to get an auger barrel, but O'Quinn said he was s and would just go to the house. O'Quinn claims that he then his dinner bucket and got into the scoop's bucket after which Stiltner asked Deel if he was refusing to run the scoop and D replied, "No", but Stiltner looked at Deel, according to O'Qu and told him that he might as well get into the scoop's bucke with O'Quinn. Deel got into the scoop's bucket and Stiltner started out with both of them, but finally stopped, at Deel's quest, so that Deel could talk to the mine committeeman, Kyle Turner. Stiltner then told O'Quinn to go back to the roof bo O'Quinn got out of the scoop and went back to the roof bolter requested, and did not hear any of the discussion which took place after Stiltner stopped the scoop so that Deel could tal to Turner (Arb. Tr. 101).

I have already provided in Finding Nos. 11 through 17, s the version of the events of May 7, 1982, which is supported the preponderance of the evidence in this proceeding. Even one were to adopt, however, the version of the events of May 1982, which was elicited from Deel during cross-examination a my questioning, DOW was justified in discharging Deel for ins ordination. Deel conceded that he had gone to "his" roof bol on May 7, 1982. He found a two-man crew already preparing th roof bolter for operation. Prior to his being off for a week he had been running the scoop on alternate days and he claime that he did not mind running the scoop because he knew "how t do everything they had there" (Tr. 186).

Although Deel said he did not mind running the scoop, he also stated that Justice did not like to operate the scoop be cause it "bounced" him around (Tr. 183). If the scoop "bounc Justice around, it would also have bounced Deel around. When came to the desirability of running a scoop as compared with operating a roof-bolting machine, Randy O'Quinn stated that o erating the roof bolter was the easiest job in the mine and t if running a scoop was as easy as roof bolting, he would have scoop operator's job (Arb. Tr. 109).

Deel's claim that he had no reason to believe that Stilt wanted him to operate a scoop when he went into the mine on

the drill and he knew from O'Quinn's presence at the roof bolt that O'Quinn was planning to operate the roof bolter because O'Quinn had been running the roof bolter when Deel operated th scoop and that O'Quinn drove the scoop when Deel operated the roof bolter (Tr. 792; 872). Deel tried to explain Justice's being at the roof bolter by claiming that Justice's dinner buc was carried on the roof bolter and that he thought Justice hac come there to get something to eat, but they had just arrived the section and no one had done any work yet.

Deel also claimed that Stiltner was sitting on the only scoop in the mine on the morning of May 7 and that there was r room on the operator's seat for both him and Stiltner. Deel said that when Stiltner told him to run the scoop or get in th scoop's bucket, he had no choice but to get into the scoop's bucket because Stiltner did not offer to get off the operator' seat so that Deel could get on the operator's seat (Tr. 132). Deel's actual knowledge of the location of scoops was much gre er than he claimed it was because Deel subsequently testified that there was another scoop operating in the mine on the morn ing of May 7 and that they sometimes used three or four scoops simultaneously (Tr. 185-186). Additionally, Deel knew that Stiltner and Fields had ridden into the mine on the little sco and he certainly knew the difference between the big scoop whi he had used for pulling the mantrip and the little scoop which Stiltner had driven into the mine. Therefore, all he would ha had to do in response to Stiltner's ultimatum for him to run t scoop or get into the bucket of the scoop on which Stiltner wa sitting would have been to have said that he had decided to ru the scoop and ask Justice, who was listening to the conversati between him and Stiltner, where Justice had left the big scoop Moreover, there was nothing whatsoever to keep Deel from stati that he would rather run a scoop than to get into the scoop's bucket. He knew that getting into the bucket would be the equ alent of consenting to being discharged. Therefore, he could not possibly have increased his risk of being discharged by re fusing to get into the scoop's bucket and simultaneously stati that he would rather run a scoop than be discharged. Instead assuring Stiltner that he did not mind running a scoop, as he claimed at the hearing, he said nothing and got into the scoop bucket to be taken out for discharge.

References to "his" Roof-Bolting Machine

On the contrary, there are ample grounds for believing t Deel had made up his mind on the morning of May 7 that he was going to do any more alternating between the jobs of scoop op tor and roof-bolter operator. He had been successful in gett Stiltner to provide him relief on the previous occasion when had refused to perform both the job of running the drill and erating tho roof bolter and he was confident that he would be able to appeal to Turner, the mine committeeman, again on the out of the mine to be discharged, and Turner would be able, a had on the prior occasion, to persuade Stiltner to put him ba to work as the operator of the roof bolter which, according t O'Quinn, is the easiest job in the mine.

Supervisor Doing Classified Work

Another of Deel's motives for insisting on operating "hi roof bolter was that Justice had been hired as a section fore Justice, as a salaried or managerial employee, was apparently violating union rules by operating the coal drill which is no mally work performed by union employees or hourly workers. T issue was a part of Deel's union grievance filed after his di charge on May 7, 1982, but that issue was dropped from the ca before the arbitrator who upheld Deel's discharge under the W Agreement (Arb. Tr. 132-133). Since Deel agreed to waive tha issue at the arbitration hearing, it is certainly inappropria for him to raise that as an issue in this proceeding.

In any event, it is a fact that there were not enough ho or union employees at the mine on May 7 to operate all the eq ment and Stiltner had no choice but to utilize Justice for th purpose of operating equipment which is normally operated by union employees. Although Deel claimed that he would have be allowed to operate the roof bolter if Justice had not been pr ent on May 7, the evidence does not support that contention b cause, after Deel was discharged on May 7, Randy O'Quinn was assigned to run a scoop and Justice operated a coal drill by ing the hydraulic power from another scoop. There were two r bolting machines in the mine and the other crew operated a ro bolting machine that day, but Deel's roof bolter was not used all (Tr. 801). Obviously, running the scoop was more importa for producing coal than having O'Quinn operate a second roof bolter.

own to be true on May 7, 1982 (Tr. 680).

equirement To Perform Work Order and Then File Grievance

Deel admitted at the arbitration hearing that he is required perform a work order and then to file a grievance if he believes that the order is unreasonable, assuming, of course, that e order does not involve a requirement that he work in unsafe nditions (Arb. Tr. 96). It would appear that Deel violated ion rules when he refused to run a scoop on May 7, 1982, beuse no safety issue was raised in connection with Stiltner's equest that Deel operate the scoop.

el's Refusal To Ask Stiltner About His Assignment

Deel conceded that Justice brought him a message to the ffect that Stiltner wanted Deel to run the scoop on May 7 rather an operate the roof bolter (Tr. 172-173; Arb. Tr. 75). Deel laimed that he could not rely upon a section foreman's order rought to him by another miner because they kid around in the ines and that if he were to obey such an order, the other miners uld have him running all over the place doing things which the ss had not actually requested him to do (Tr. 188). Also Deel id that if he had gone to the scoop and had started running it the basis of a message from Stiltner brought to him by Justice hat he could have been fired for leaving "his" roof bolter at he face and going off to do another job (Tr. 174).

On the other hand, the mine committeeman, Kyle Turner, tated that if another miner had brought him a message to the ffect that his supervisor wanted him to run a scoop instead of roof bolter, that he would have finished installing the bolt was then working on and "* * * would go hunt the foreman" Arb. Tr. 126). Turner is an experienced miner and his answer hows that Deel was being unduly obstinate in failing at least check with Stiltner so as to find out for sure what his assign ent was for that day. After all, Deel had not started doing any rk and Stiltner was only 120 feet from the place where Deel's oof bolter was situated (Tr. 796).

As indicated above, there has been no mention by anyone in his proceeding that operating the scoop, as requested by Stilter, would have exposed Deel to any hazardous conditions. Therore, I cannot find any justification whatsoever for Deel's re-

The attorneys who represented Deel in this proceeding were very conscientious and prepared a brief which presents Deel's contentions in as favorable a manner as they can possibly be argued. Deel's counsel followed the Commission's burden-of-proo guidelines as set forth in the Pasula case, supra, in an admirable fashion. Nevertheless, Deel's contentions lose all of thei validity when one begins to examine in detail the true facts which underlie Deel's legal arguments.

Deel's brief contains a Table of Contents which facilitates review of his arguments. It is claimed under Part I that Deel's discharge was motivated by his protected activities. Part A under the aforesaid heading lists the protected activities in whic Deel is alleged to have engaged. As I have previously indicated it is a fact that Deel was a safety committeeman for about 32 calendar days and he also accompanied an MSHA inspector on some inspections while he was safety committeeman. Therefore, Deel did engage in some protected activities prior to his discharge.

While Deel's brief does establish that he was engaged in some activities which are protected under the Act, Deel's brief utterly fails to show that his protected activities had anything whatsoever to do with his discharge. It is correct, as Deel argues under Part I(B) of his brief, that DOW was aware of Deel's activity as safety committeeman and it is a fact that he only held that position for 32 days prior to his discharge. Therefore, Deel is necessarily correct in arguing that his protected activity preceded his discharge by only a short period of time. The preponderance of the evidence, however, fails to support the remaining allegations made under Part I(B) of Deel's brief. As I have shown under the headings discussed above, Deel incorrectl argues that DOW displayed animus in the face of Deel's protected activity. Deel himself, for example, stated that when he was first appointed as a safety committeeman, the mine foreman was very cooperative and provided Deel with all the supplies and equipment he needed to make the mine safe (Tr. 199). As to the remaining contentions in Part I(B) of Deel's brief pertaining to DOW's alleged animus toward Deel for his protected activities my discussion, supra, of the hauling of powder on the tractor, the belt-bridging incident, Deel's alleged refusal to support DOW in the simultaneous firing of two shots, and Deel's allegations of disparate treatment have been thoroughly considered above under those respective headings and the preponderance of

Deel's argument that he was not given a direct order to operate the scoop for the entire shift before he went into the mine on May 7, 1982, the preponderance of the evidence supports the section foreman's contention that Deel knew before going into the mine that his section foreman wanted him to operate the scoop on that day. I have addressed that contention in great detail in my discussion of the "The Actual Discharge" above, and the preponderance of the evidence clearly supports the section foreman's contention that Deel knew that his section foreman wanted him to operate the scoop before he went into the mine on May 7. Assuming, arguendo, that Deel did not know his section foreman wanted him to operate the scoop on May 7 before Deel went into the mine Deel's argument in Part II(A)(1) of his brief cannot be sustained because Deel was given a message from his section foreman by another miner as to exactly what the section foreman wanted Deel to do, but Deel was so determined to ignore his section foreman's orders that he refused to go a distance of only 120 feet to ask what his section foreman actually wanted him to do that day. Moreover, it cannot be successfully argued that Deel did other than argue with his section foreman about the assignment even after the section foreman personally came to Deel and gave him specific orders that he wanted Deel to operate the scoop, instead of the roof-bolting machine, on May 7, 1982. These matters are all discussed in great detail above under the headings of "The Actual Discharge" and the other headings following my discussion of the actual discharge.

The most astounding and utterly unfounded argument in Deel's brief is contained under Part II(B) in which he claims that even if he had refused to operate the scoop on the day of his discharge DOW still would not have been justified in terminating him. Since my prior discussions above of the factual allegations in this proceeding have not specifically dealt with the arguments in Part II(B) of Deel's brief, beginning on page 39 of the brief, I shall give those contentions some detailed consideration at this time. Deel attempts to find support for the aforesaid contention by stating that DOW's management has no established policy for determining when a miner will be discharged for refusing to obey a work order. Deel also claims that the mine foreman inconsistently stated first that an employee was given a warning for the initial refusal to obey a work order and was discharged for the second offense and later stated that the employee was discharged for the first offense.

was not accompanied by any ameliorating circumstances. He ig-
nored the previous conditions under which the work force had
used which required him to alternate with O'Quinn on running
scoop one day and a roof-bolting machine the next. He ignore
the clear indications that the section foreman expected him t
run the scoop because Justice and O'Quinn had gone to the roo
bolting machine before Deel ever reached that machine after de
livering the other men to their assigned working places. Dee
then ignored a specific message brought by Justice from the se
tion foreman telling Deel that the section foreman wanted him
run the scoop. Deel then argued with the section foreman in
son about the assignment to operate the scoop. Finally, when
given the ultimatum that he would have to run the scoop or ge
into the scoop's bucket to be taken out for discharge, Deel s
nothing and got into the scoop's bucket to be taken outside.

The aforesaid defiant refusal to perform a work order ca
be tolerated by a section foreman if he wants to control the
force on which he has to rely for production of coal. Theref
regardless of whether DOW's management has written guidelines
a consistent policy of determining when it will discharge em-
ployees, Deel's refusal to carry out his section foreman's or
on May 7 were accompanied by such blatant defiance of his sec
foreman's instructions that the section foreman was clearly w
in the bounds of reason in deciding that Deel should be given
the ultimate punishment of discharge.

Assuming, arguendo, that there is some merit in Deel's c
that he should only have received a warning for his first ref
to obey a work order and should not have been discharged unti
had refused a second time to perform a job assigned to him by
foreman, it is a fact that Deel did refuse to perform work on
prior occasion as I have noted in the discussion above under
heading of "The Aborted Discharge". Deel, of course, argues
his brief (pp. 40-41) that DOW cannot take refuge in a claim
Deel's refusal to perform the two jobs of bolting and drillin
a prior occasion should be counted as a true refusal to perfo
work because, it is argued, that assignment was unfair and th
fact that the section foreman ultimately did the roof bolting
Deel for the remainder of that day shows that Deel was unfair
asked to do two different jobs. As I have already pointed ou
my discussion of the aborted discharge above, Deel was nearly
charged that day for failing to do anything more than drill l
holes, requi i 0 i u s of time, thin a perio f a h

eel on that day, had to operate a roof-bolting machine for the emainder of the shift and therefore had to slight his supervisor ork. If he had failed to make methane checks or otherwise had ailed to assure that the miners were using proper safety pro-edures, an accident could have occurred solely because of Deel's ostinate refusal to do two types of work on a day when a full rew of miners was not available.

The aforesaid discussion shows that if Deel was supposed to ave been given a warning for the first refusal to perform work, e had already had that warning when the section foreman almost scharged him on the previous occasion. Consequently, his dis-arge on May 7 occurred after a first warning if that is a pre-equisite which should be given any consideration.

The final argument Deel makes in Part II(B) of his brief . 41) is that Deel would not have been discharged on May 7 ex-pt for his protected activity because other miners had engaged unprotected activity of refusing a work order and had not been sciplined by discharge for such unprotected activity. As I ave clearly shown above under the heading of "Deel's Allegations Disparate Treatment", other miners have not engaged in refusal obey work orders in the defiant and belligerant manner which s associated with Deel's refusals to work. If the other miners d acted as Deel did, I am confident they would have been dis-arged just as Deel was.

The Commission pointed out in the Pasula case, supra, at ge 2795, that a judge should give some weight to an arbitrator' cision if there was congruence between his decision and the ssues raised in a discrimination case. I have noted in Finding . 18, supra, that the question of Deel's discharge on May 7 was e subject of an arbitrator's decision issued on June 8, 1982. at decision is pertinent in ruling upon Deel's arguments in rt II(B) of his brief because the arbitrator, upon an adequate cord, discussed Deel's refusal to operate the scoop on May 7 d found that his discharge was justified. The arbitrator inted out on page 6 of his decision that refusal of an employee comply with an order of his foreman is one of the most serious fenses which can be leveled at a subordinate. The arbitrator und that Deel had willfully refused an order given by his fore-n and that DOW's management was clearly justified in discharg-g him for that refusal. I agree with the arbitrator's ruling d believe that his decision is a further reason for holding

The motion to dismiss made by respondent's counsel is granted and the complaint filed on September 23, 1982, in D No. VA 82-62-D is dismissed for failure of complainant to p that a violation of section 105(c)(1) of the Federal Mine S and Health Act of 1977 occurred.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 80-216 A.C. No. 11-00609-03016
v.	:	Captain Strip Mine
SOUTHWESTERN ILLINOIS COAL CORPORATION, Respondent	:	

ORDER

Before: Judge Koutras

On October 31, 1983, the Commission issued its decision on the appeal filed in this matter and remanded the case to me for the determination of an appropriate civil penalty for Citation No. 777767, issued on November 30 CFR 77.1710(g). The Commission reversed my decision vacating this citation, reinstated and affirmed the violation, and remanded the case for an assessment of civil penalty.

By agreement of the parties, and after consideration of the record in this case, including the statutory criteria found in Section 110(i) of the Act, a civil penalty assessment of $78 is imposed for the violation in question, and the respondent IS ORDERED to pay this amount within thirty (30) days of the date of this Order. Upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ex. rel. MICHAEL HOGAN and ROBERT VENTURA, Complainants	:	Docket No. PENN 83-141-D
	:	Emerald No. 1 Mine
v.	:	
EMERALD MINES CORPORATION, Respondent	:	

DECISION

Appearances: Catherine O. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelph Pennsylvania, for the Complainants;
R. Henry Moore, Esq., Rose, Schmidt, Dixon & Ha Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern a complaint of discrimination filed by the Secretary of Labor on behalf of the named complainants pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint alleges that Mr. Hogan and Mr. Ventura were suspended without pay for five days by the respondent on or about December 28, 1982, for exercising certain protected safety rights under Section 105 of the Act. Specifically, the complainants assert that they were suspended by mine management for refusing to ride an elevator which they believed to be unsafe. The elevator is used to transport the working shifts to the underground working section.

A hearing was convened in this matter on August 23-24, in Washington, Pennsylvania, and the parties appeared and participated fully therein. Posthearing proposed findings and conclusions, with supporting arguments, were filed by the parties and they have been fully considered by me in the course of this decision.

. Ventura to ride the elevator in question to their assigned
ork stations on the asserted grounds that it was not safe
as reasonable and made in good faith. Additional issues
aised by the parties are identified and disposed of in the
ourse of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977,
) U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine
fety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2)
ad (3).

3. Commission Rules, 29 CFR 2700.1, et seq.

omplainants' Testimony and Evidence

Michael Hogan testified that he first heard about a
roblem with the elevator during his work shift of December 27,
982. Sometime after 5:00 p.m., he heard the shift foreman
all underground superintendent Morris to advise him that
e elevator was inoperative. However, shortly thereafter,
e problem was taken care of and the elevator was operating,
ad he left the underground section by means of the elevator
thout any problem, and heard nothing further about any problem
e next returned to the mine at approximately 3:30 p.m.,
n December 28, and he went to the bathhouse to change into
is work clothes. At this time he learned from general bath-
ouse conversation that the crew on the evening shift of
ecember 27 had encountered some problems with the elevator,
ad that the day shift on December 28th had delayed entering
ie mine until approximately 10:00 a.m., because the elevator
ad some problems and some maintenance people were working
n it. He also spoke with someone on the day shift who advised
im that the elevator doors would not open (Tr. 29-34).

Mr. Hogan testified that after he dressed and left the
amp room on December 28th, he encountered several miners
rom the day shift who had just alighted from the elevator
t the end of their shift, and he identified them as Pat Butterm

returned to the lamproom for a cigarette, and as he spoke wi
Terry Limely, another miner who had just alighted from the
elevator. Mr. Limely told him "you are crazy if you get o
that thing, it is really messed up, it's really bad". Whe
he questioned Mr. Limely further, Mr. Limely informed him
that the elevator had dropped, started to fall, stopped
suddenly, and that his knees buckled (Tr. 36).

After assessing the situation further, and since it
appeared that there would be no "collective refusal" to ri
the elevator, Mr. Hogan decided to speak with shift forema
Denny Smith. He advised Mr. Smith that he did not believe
the elevator was safe to ride and that he was invoking his
individual safety rights in refusing to ride the elevator,
but that he was available for other work (Tr. 39). Mr. Sm
asked him to stand aside while the other employees were lo
on the elevator, and by this time Mr. Ventura had also inv
his safety rights and refused to ride the elevator. At th
point in time, mine foreman Allen Hager arrived on the sce
and Mr. Hogan advised him that he would not ride the eleva
and Mr. Hager responded "there's nothing wrong with it" (T

When asked to explain why he believed the elevator wa
not safe at the time of his refusal to ride it, Mr. Hogan
replied as follows (Tr. 42-43):

> Q. Why did you believe that the elevator was not safe at that time, Mr. Hogan?
>
> A. Well, I felt very sure, for myself, that all the incidents that had happened in the previous twenty-four hours or so, and then the most recent incident, at approximately ten to four, so I felt that if this had been a problem for all this time, that there should have been something done about it, it shouldn't still be mal-functioning like that.
>
> Q. In your opinion, was it still defective at that time?
>
> A. Absolutely.

one thing that Terry Limely had said about it, buckling his knees, I thought perhaps about being injured in it.

Q. What kind of injuries did you feel that you could sustain?

A. Well, I felt that I could get killed, you know, anything from being highly shook up to being killed, or anything in between, you know what I mean.

Q. Mr. Hogan, what reason did you give to Mr. Hager, as to why you were afraid to ride the elevator on that day?

A. Well, I told him that I didn't think it was safe, you know.

Mr. Hogan stated that at the time he informed Mr. Hager that he would not ride the elevator, he had no knowledge as to steps had been taken to ascertain the reason for the elevator "dropping". He did know, however, that the elevator had been "test run" up and down several times after the complaints by the day shift crew, but he had no knowledge as to whether or not any repairs or maintenance had been performed. He was also aware of the fact that several groups of miners from his shift went underground on the elevator after the complaints were made (Tr. 44). Mr. Hogan also stated that he asked maintenance foreman Jackie Smith "what was wrong with the elevator", and that Mr. Smith replied that he did not know and could not state whether it was safe (Tr. 45).

Mr. Hogan testified that after the initial conversation with Mr. Hager, Mr. Hager instructed Mr. Denny Smith to "find something for us to do" (Tr. 45). He later spoke with Mr. Hager by phone while he (Hogan) was still in the elevator area, and he again informed Mr. Hager that he would not ride the elevator because he didn't feel it was safe, and that "I was using my safety rights" (Tr. 46). Mr. Hogan confirmed that Mr. Hager offered to operate the elevator manually, but he still refused to ride it, and he explained the refusal as follows (Tr. 47):

> him that I didn't feel that in my opinion, it didn't make a difference whether it was run on manual or automatic, they seemed to have an obvious problem, and unless they knew the source of the problem, I don't think that they could say it would be safer one way or the other.

Mr. Hogan confirmed that he and Mr. Ventura were then summoned to Mr. Hager's office, and Mr. Hager asked if they were willing to ride into the mine on the slope car. Mr. Ho stated that he asked Mr. Hager how this would "leave us in regard to having two fresh air escapeways from the mine", and Mr. Hager did not reply and instructed Denny Smith to find something for Mr. Hogan and Mr. Ventura to do. Mr. Hog and Mr. Ventura left the office, but were immediately called in again and Mr. Hager informed them that he was withdrawing his offer to have them transported into the mine by means of the slope car. Mr. Hager also informed them that dependi on the outcome of an investigation by federal and state agen they could be subject to disciplinary action, up to and including discharge, and Mr. Hogan informed Mr. Hager that "I understood the situation" (Tr. 50).

Mr. Hogan stated that after leaving Mr. Hager's office, he and Mr. Ventura spent the rest of the shift working aroun the bathhouse (Tr. 50). At approximately 6:00 p.m., the ele manufacturer's representative arrived, and shortly thereafte state inspector Monohan and federal inspector Conrad arrived At approximately 8:15 p.m., Mr. Hogan, Mr. Ventura, and mana and union representatives were summoned to a meeting in Mr. office. Mr. Hager asked the elevator representative whether it was safe and he indicated that "in his opinion, the eleva was safe, and none of the safety features had been jumpered out". Mr. Hogan stated that he "nodded in the affirmative" to this statement, and that Mr. Conrad indicated that he was no expert on elevators, but was simply present "to see that there were no violations of law", and that after speaking with the elevator representative, he simply wanted to assure Mr. Hogan and Mr. Ventura that it "was safe to run" (Tr. 52) Although Mr. Hogan stated that Mr. Monohan concurred with Mr. Conrad, Mr. Hogan said that Conrad made the statement th "he wouldn't rode [sic] the God damn thing either" (Tr. 54).

opinion that Bob and I had interfered with their right to direct the work force at four o'clock, by not boarding the elevator, and we had acted arbitrarily and capriciously, and not in good faith, in not boarding the elevator, and that we were thereby suspended for five days, beginning at about eight forty-five, which the time was, and not to return to work, until Wednesday, January the 5th.

Mr. Hogan confirmed that he became angry after being inf that he was suspended, and that at this time he was available to work underground and would have ridden the elevator (Tr. 56). Mr. Hogan also confirmed that he stated to Mr. Hag that "they had a pretty good guy here up until this point, now I wasn't sure, but watch out now, or something to that effect". Mr. Hogan explained that he was upset because he did not believe he would be suspended, and he confirmed that since the episode he has had no suspensions or other actions taken against him (Tr. 57).

Mr. Hogan stated that after the oral suspension, he met further with Mr. Hager during the initial grievance stage of his case, and he identified exhibit G-1, as a copy of the written notice of suspension which he received on January 4, and he confirmed a notation on the notice which states "revised as agreed in the meeting of December 31, 1982" (Tr. 58). Mr. Hogan explained the notation, and he also confirmed that he had been involved in a prior exercise of his safety rights in the summer of 1981, and was assigned other work but was not suspended (Tr. 60-62). Mr. Hogan also confirmed that he has made safety complaints in the pas and that they are generally taken care of (Tr. 62).

On cross-examination, Mr. Hogan confirmed that he did not know what the elevator problem was on December 27, but by the end of the shift the elevator was repaired, and that any repairs were made within ten or fifteen minutes after he heard that the elevator was inoperative. Mr. Hogan also confirmed that when he spoke with Jackie Smith, Allen Hager, and Denny Smith on December 28, he did not ask them about the condition of the elevator on December 27 (Tr. 65). Mr. Hogan stated that he spoke with no one on the midnight shift, and that other than e fact that t e elevator was

Mr. Hogan confirmed that on the afternoon of December 28 after the "elevator dropping incident", there were some tests made on the elevator and it was his understanding that local union president Tom Rebottini rode the elevator during the tes (Tr. 68). Mr. Hogan also confirmed that one or two elevator loads of men on the evening shift went underground before he approached Dennis Smith to tell him he would refuse to ride i and at these times Mr. Hogan saw no evidence of any elevator malfunctioning (Tr. 69).

Mr. Hogan confirmed that during the taking of his deposi he did indicate that to a small degree, he has a fear of bein enclosed in small spaces, and in response to a question as to whether he had a certain fear or riding elevators, he replied "I would call it more of a healthy respect for them" (Tr. 73).

Mr. Hogan stated that prior to the time he refused to ride the elevator, he was aware that the elevator "had been run up and down", and that after the "elevator stopping incident", he did not ask Dennis or Jackie Smith or Mr. Hager whether they had checked the elevator to determine what was wrong with it (Tr. 77).

In response to bench questions, Mr. Hogan confirmed that he was not on the elevator during the alleged "dropping incident", and his knowledge of this event is from what other told him (Tr. 79-80). He recounted what he had heard as follows (Tr. 81-83):

> JUDGE KOUTRAS: While you were back there, waiting to come to your shift, you had oonversations with people, that were coming off of the day shift?
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: During these conversations, you learned about the problems with the elevator?
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: Now, you indicated that you talked about all these things that had happened, on

minute of the time they come out from the elevator that dropped.

JUDGE KOUTRAS: And they said what?

THE WITNESS: They said that it had come up, started to drop, and then fell, and the one in particular, said his knees buckled, and they were saying they were scared.

JUDGE KOUTRAS: Okay.

THE WITNESS: And the one individual screamed.

JUDGE KOUTRAS: Who was that?

THE WITNESS: I don't know, they said somebody on the elevator screamed.

JUDGE KOUTRAS: Did they tell you how far the elevator dropped?

THE WITNESS: Each had their own opinion of that, it's very difficult to tell, but you can't say.

JUDGE KOUTRAS: Any length of time, how did they describe the dropping to you?

THE WITNESS: Well, one individual said, he thought it fell about ten feet, and another one, some of their estimates ran much higher than that, to the possibility that it could have been a hundred feet, or something like that.

JUDGE KOUTRAS: Once the drop had stopped, how did they come out, how did the elevator proceed, how did they take care of the problem, when I say they, whoever was there in charge, did they have somebody there on the elevator that was in charge of the crew?

THE WITNESS: Well, at the time of the incident Jackie Smith was in the penthouse, which is above

THE WITNESS: I suppose he knew some way that something had malfunctioned.

JUDGE KOUTRAS: How did he know that, was this elevator coming up and down automatically, do you know?

THE WITNESS: As far as I know, it was running on automatic at that point, yes, but see, because they were having the problems, there were someone where the elevator comes up here, there's an area above the elevator, right above the shaft, to other controls and circuits and stuff, where I guess Jackie Smith was in that penthouse, what they call the penthouse, at the time it malfunctio and he just in some manner, knew that it was malfunctioning, and he brought it up manually.

Mr. Hogan indicated that Jackie Smith told him that he not know what was wrong with the elevator, and Mr. Hogan bel that the only time the elevator would be operated on a manua mode would be in the event of a motor malfunction (Tr. 87, 8 Regardless of which mode it operated on, he did not believe that management had sufficient time to check the malfunction and conduct proper tests (Tr. 89). He conceded that the pri elevator problems had been taken care of the day before his work refusal, but he insisted that "some problem apparently kept repeating itself" (Tr. 90). He also believed that it "was possible" that the prior malfunction still prevailed, and when asked whether he would have still refused to ride the elevator if no one had mentioned that it had dropped, he answered "I don't know, that's hypothetical" (Tr. 91).

Mr. Hogan confirmed that safety committeeman Willis and Union President Rebottini were both present when he refus to ride the elevator, and he indicated that they worked the same shift. He stated further that Mr. Rebottini worked underground and rode the elevator, but that Mr. Willis was assigned to surface work (Tr. 93). Mr. Hogan also confirmed that approximately a year or so earlier he had refused to ride the same elevator, but that this prior incident did not influence his decision in this case (Tr. 98).

refusing to ride the elevator (Tr. 102). He stated that the elevator was installed sometime in 1976 or 1977, and that it has been the topic of past discussions and meetings between the union and mine management (Tr. 104).

Robert Ventura testified that he is employed by the respondent as a mechanic, and that at the time of his suspension he worked as a utility man. He stated that on December 27, 1982 he reached his working place by means of the elevator which took his crew underground on the second shift, 4:00 p.m. to 12:00 p.m. Mr. Ventura stated further that at approximately 5:30 p.m. that day he was informed by his foreman that the elevator was inoperative and that if it were not repaired within a half hour the crew had the option of leaving the mine. Since the elevator was the main escapeway, Mr. Ventura indicated that he would leave and requested that he be allowed to do so. However, since the elevator was repaired, he did not do so. He subsequently took the elevator out at the end of his shift at approximately 11:45 p.m. One of his fellow shift workers told him that as he was boarding the elevator to leave, it raised up 8 to 12 inches and he tripped while getting on (Tr. 109-111). However, Mr. Ventura did not report this and went home.

Mr. Ventura testified that he reported for work on December 28, 1982, and while in the bathhouse he had some discussions with other miners concerning the elevator, but he did not know any of the specific details. While in the lamphouse he said one of the miners from the day shift, Jerry Kessler, advised him that the elevator had stopped and then dropped about fifty feet while he was riding it up the shaft at the end of his work shift. Mr. Ventura then proceeded to the elevator and asked his safety committeeman Willis if the elevator was safe, but he could not state whether Mr. Willis responded. Mr. Ventura then spoke with section foreman Russ Clark, and Mr. Clark referred him to foreman Denny Smith. Mr. Smith advised him that the elevator was safe and referred him to Mr. Hager, but Mr. Ventura did not discuss his safety rights with Mr. Smith (Tr. 111-117).

Mr. Ventura confirmed that Mr. Hager offered to operate the elevator on the manual mode, but he (Ventura) stated that

and Mr. Ventura confirmed that this made no difference to him as he was exercising his own personal safety rights in refusi to ride the elevator (Tr. 117-120).

Mr. Ventura confirmed the meeting in Mr. Hager's office and he also confirmed that Mr. Hager offered to take him into the mine by means of the slope car. However, after Mr. raised the escape route question, Mr. Hager said nothing furt and he and Mr. Hogan were assigned other work (Tr. 121). Mr. subsequently retracted his offer to take them in by means of slope car (Tr. 122). Mr. Ventura corroborated the fact that another meeting was held with Mr. Hager and that he was subse suspended (Tr. 123-128).

On cross-examination Mr. Ventura confirmed that at the t of his refusal to ride the elevator he believed that "there w thing wrong with the elevator", and he confirmed that he knew nothing about its features (Tr. 133). He also confirmed that Mr. Kessler told him it dropped fifty feet and that this scared him, but that no one was injured. He conceded that since no one was hurt after the asserted fifty foot drop, Mr. Kessler may have exaggerated the extent of the drop (Tr. Mr. Ventura also confirmed that he asked no one else on the elevator about the drop, and he stated that he did tell Mr. S and Mr. Hager what he heard about the elevator dropping fifty feet (Tr. 135).

Mr. Ventura confirmed that he knew that the reported elevator malfunction of December 27th had been repaired, but that he did not know all of the specifics of the problem (Tr. 135). He also stated that it was possible that he would not have refused to ride the elevator had Mr. Kessler not mentioned the drop (Tr. 136). Mr. Ventura indicated that he was not aware that test runs had been made on the elevator on December 28th prior to his work shift, and he was unaware that Mr. Rebottini had ridden it (Tr. 139). Mr. Ventura stated that he mentioned the elevator dropping to Dennis Smit Jackie Smith and Alan Hager, but that none of them could assure him that the elevator was safe (Tr. 141).

In response to further questions concerning what he told mine management about the elevator dropping, Mr. Ventura stated as follows (Tr. 149-151):

THE WITNESS: My shift foreman.

JUDGE KOUTRAS: Which is?

THE WITNESS: My section foreman, Mr. Clark.

JUDGE KOUTRAS: You told Mr. Clark, that you were reluctant to get on the elevator, and Clark did what?

THE WITNESS: He referred me to the shift foreman, Mr. Smith.

JUDGE KOUTRAS: Who was Mr. Smith, and you told him the same thing?

THE WITNESS: Yeah.

JUDGE KOUTRAS: Now, in both those conversations did you specifically tell either Mr. Clark, or Mr. Smith, that someone had told you that the eleva had dropped fifty feet?

THE WITNESS: Yes.

JUDGE KOUTRAS: You did?

THE WITNESS: Yeah, well, I didn't say fifty feet, but that it had dropped.

JUDGE KOUTRAS: Did you tell them who had told you that?

THE WITNESS: No.

JUDGE KOUTRAS: Then what happened, when did Mr. Hager get in on the act?

THE WITNESS: Mr. Smith referred me to Mr. Hager.

JUDGE KOUTRAS: Was Mr. Hager there physically?

JUDGE KOUTRAS: Did you specifically tell Mr. Hager, that you had heard from someone from the previous shift, that the elevator had dropped some distance?

THE WITNESS: Yes.

JUDGE KOUTRAS: What was his reaction to that?

THE WITNESS: He couldn't answer why, I asked him if he was aware of the elevator dropping, and he says, no.

JUDGE KOUTRAS: Do you have any idea how many people were on the elevator, when riding it up with Mr. Kessler?

THE WITNESS: I would say maybe eight people, I don't know, for sure.

JUDGE KOUTRAS: About eight, and you heard no one else say anything about the elevator dropping, how far it dropped or anything?

THE WITNESS: Not at the time, you know it was a situation, where I was coming out to get my lamp, and Jerry was there, and other people were starting to leave, I was running late.

Martin Willis, stated that he is employed by the respondent a motorman, and that he is vice-president of local union 58 and also serves a safety committeeman. He confirmed that went to the mine on December 28, 1982, at 9:00 a.m., attend a safety meeting with mine management and that he s scheduled to work that day on the 4:00 p.m. to 12:00 midnight ift. While at the bathhouse someone advised him that there was problem with the elevator, and he spoke with the general mine reman Allen Hager about the matter and Mr. Hager advised him at "they were working on it". Mr. Willis then proceeded the elevator area and someone from the work crew which had st finished a shift told him that "the elevator came up, stopped lt like it dropped, and then it came up on inspection speed" r. 165-169, 171). When asked who told him this, he identified e crew members as Jerry Kessler and Wayne Bara, and he dicated that Mr. Kessler a peared scared and frightened

Mr. Willis confirmed that while speaking with several miners waiting to go underground on the four to midnight shift, Jackie Smith informed him that he did not know what was wrong with the elevator and that he could not state whethe it was safe. Mr. Willis did not speak with Mr. Hogan or Mr. Ventura at this time, but he did learn that they informed foreman Denny Smith that they were invoking their individual safety rights and would not ride the elevator underground. Mr. Willis then accompanied Mr. Hogan and Mr. Ventura to Mr. Hager's office for a meeting, and Mr. Ventura and Mr. Hoga were subsequently assigned other work. Later, a federal and state inspector arrived on the scene but did not examine the elevator. The elevator company mechanic changed some electrical contactor points and determined that the elevator safety features had not been "jumpered out" (Tr. 178). Later, Mr. Hager informed him that Mr. Hogan and Mr. Ventura would be suspended for five days (Tr. 179). Mr. Willis confirmed that federal inspector Conrad stated that he found no violations of federal law and that as far as he was concerned the elevator was safe. However, state inspector Monahan indicated that he would not ride the elevator (Tr. 180).

On cross-examination, Mr. Willis stated that when he spok with Mr. Kessler he did not tell him how far the elevator had dropped, and that Mr. Bara characterized the elevator as being "f..... up" (Tr. 183). He also confirmed that while Mr. Bara did not specifically state that the elevator had dropped, he did indicate that it "felt like it" (Tr. 184). Mr. Willis also confirmed that Jackie Smith told him he could not find the elevator problem (Tr. 184).

In response to further questions, Mr. Willis confirmed that after the inspectors and the elevator representativo were called, they all "gave the elevator a clean bill of healt and while no one knew what the specific problem was, the chang of the contactor points took care of it and he learned that if dirt gets into the contactor tips they have a tendency to stick (Tr. 190).

Mr. Willis stated that he did not believe that mine management acted unreasonably by calling in the elevator mechanic and the state and federal inspectors, but he believed that Mr. Hogan and Mr. Ventura should not have been suspended, and he expected management to just l t them go back to work

and that it had been repaired, but he was not aware of the specific problem. His crew used the elevator and he was not aware of any other problems with it during his shift. However, after his work shift ended and while coming up on the elevator a problem developed, and he described it as follows(Tr. 205-207):

> A. Well, when we got on the elevator, we started up, the elevator got approximately one hundred feet from the top, the cage stopped, it fell, how far, I don't know, it stopped, it started back up, and it stopped a third time, then that's when Wally Petros called out to see what was the matter, and he said, that they said it would be going in just a second.
>
> Q. Who is Wally Petros, can you tell the Judge?
>
> A. He's one of my mechanic bosses.
>
> Q. Did you hear him make the phone call?
>
> A. He made the phone call, I didn't hear the conversation.
>
> Q. What did he say to you after he made that call?
>
> A. He said that it would be fixed in just a minute that it would be coming up, and then it started up on inspection speed, slow speed.
>
> Q. Can you describe for the Judge, in as much detail as you can, as much as you can recall, how long the drop, and how long the drop lasted, when you were in the elevator, can you give us an idea of the distance?
>
> A. It was difficult to tell, because you were enclosed in the cage, but when it stopped, it fell, the second stop buckled my knees, because we were on a downfall, I had time enough to make up my mind, I was prepared to hit the bottom, and I

shook up.

Q. How about when you got off the elevator, what happened when you finally got to the top?

A. Well, as soon as it got to the top, the door opened, and everybody rushed for the landing.

Mr. Kessler testified that after getting off the elevator he mentioned the elevator episode to Denny Smith, but he assume that Mr. Smith did not hear him (Tr. 208). Mr. Kessler spoke to no other management people, but did speak with Mr. Willis and Mr. Ventura. Mr. Kessler stated that "I told Bob Ventura that something was wrong with the cage, and told him to go out and find out what was wrong" (Tr. 209). Mr. Kessler confirmed that he returned to work the next day and the elevator had been fixed and the midnight and second shift had taken it underground (Tr. 210). After observing several elevator trips, he too rode it underground (Tr. 211).

On cross-examination, in response to a question as to whether he told Mr. Hogan or Mr. Ventura a specific distance that the elevator fell, Mr. Kessler replied as follows (Tr. 21

Q. Did you tell him how far it fell?

A. I would imagine six to eight feet if I made a guess, I don't know.

Q. So you didn't tell him that it had fallen -- either Mr. Ventura, or Mr. Hogan, that it had fallen fifty feet?

A. No, sir, I didn't tell it had fallen fifty feet.

Mr. Kessler explained further that he did not tell Denny how far the elevator had dropped, and that no one else from mine management was present when he got off the elevator (Tr. 214). When shown a copy of his prior statement to the MSHA investigator indicating that the elevator dropped 10 to 15 feet, Mr. Ventura was asked to reconcile that statement with his testimony that it only dropped six to eight feet. He replied "you are enclosed in the cage, I can't tell you

that the elevator had been fixed (Tr. 227). When asked whether anything unusual happened when he came out of the mine on the elevator at the end of his shift, he replied as follows (Tr. 227-229):

> A. Well, when we got on the elevator, the doors weren't exactly operating correctly.
>
> Q. What were they doing?
>
> A. The doors were slow to close, and then finally someone pushed it shut. And we started up, and I don't know how far up, it seemed like it was fairly close towards the top, than it was the bottom and it hung up, stayed there for a couple of seconds and then fell, and then locked, felt like it was pretty solid down, and then while we were falling, one guy screamed and Bob Richie grabbed a hold of my arm, pretty tight, it was hurting me, and then it locked up pretty solid, it felt just like it hit something.
>
> It wasn't the ground or anything, it was like something caught a hold, it felt solid after that, a couple of jerks, and then, while we were waiting there, Wally Petros called outside, and I don't know who he called, but a few minutes after he hung up the phone, it jerked a couple of times, and then started up.
>
> Q. Did you hear what Wally Petros said that day?
>
> A. He was asking about the elevator itself, and I didn't hear no response, and he just kept saying, yeah, yeah, after that.
>
> Q. What did he say, to the rest of you in the elevator?
>
> A. He said, it would be fixed in a little bit, we would be going up, and the next thing you know, we were going up on inspection speed, real slow.
>
> Q. Ca you describe for us, how you felt when

A. [illegible] the bottom, actually, when it fell, then after we locked up solid, and while we were standing there, one guy popped the top off of it, and looked up, and we could see the top of the shaft, it was still a fairly good distance, and I was scared, being locked there, myself.

Mr. Dowling testified that after he got off the elevator made no comments to any of the other miners, and since did not know Mr. Hogan or Mr. Ventura he did not speak th them (Tr. 230). He returned to work the next day and de the elevator and "it worked fine" (Tr. 231).

On cross-examination, Mr. Dowling confirmed that after got off the elevator he did not approach mine management, t he was sure that someone else had informed them as to at happened (Tr. 233).

Charles W. Cooper, continuous miner operator, testified at he worked the 8:00 a.m. to 4:00 p.m. shift at the mine December 28, 1982, and he did not enter the mine until proximately 9:45 a.m. because the elevator was not working operly (Tr. 238). When asked whether anything unusual ppened at the end of his shift, he replied as follows r. 239-241):

A. Well, we started up in the elevator, it came up, oh, a little over half way, and then the elevator stopped, and when it stopped, and then it seemed to drop right back down, it dropped oh, around eight to ten feet, roughly, and we couldn't judge the distance it fell, and then the elevator stopped again, and like locked up, and when it locked up, everybody jumped down you know, like, you were on a gum band, just being bounced, and you could feel the elevator, like shaking up and down.

Q. Could you see the other people move up and down, like you just described?

A. Yes, all of them, the majority of them did.

Q. Okay. What else happened, what did the other employees do now?

A. I thought we were going to the bottom.

Q. Were you afraid?

A. Yeah.

Q. What happened next?

A. Well, then, Wally Petros, the foreman, got on the phone, and called out to somebody outside or something.

Q. Could you hear what he said?

A. No, offhand, I couldn't hear what he said.

Q. What happened, after he called outside?

A. The elevator, it was a few minutes, and then the elevator started, and it started coming up, when it got to the top, it went up past where it usually stops at the door, about eight, ten inches above, and then somebody or something, it recycled or something, and it came back down a couple of inches above the normal position, the door opened.

Mr. Cooper stated that after he got off the elevator he spoke with Mr. Willis and advised him that "there's someth wrong with that elevator". However, he did not see or speak with Mr. Hogan or Mr. Ventura (Tr. 243). Mr. Cooper confirme that he returned to work the next day, December 29, and was told that the elevator had been repaired, that some relays were replaced, and he rode it underground without incident and there has been no reoccurrence of any elevator "dropping" (Tr. 244).

On cross-examination, Mr. Cooper stated that he could not recall seeing the wall of the elevator shaft from the inside of the elevator when it dropped, and he confirmed that he estimated that it fell eight to ten feet "by the way I felt" (Tr. 245). He estimated that 18 to 19 miners were on the elevator during the incident in question (Tr. 246).

d someone commented that there was a problem with the elevator
could recall no specifics, he did not ask the shift foreman
there was a problem, and he could recall no conversations
to whether the elevator had problems (Tr. 252). As the
ew began getting on, he hesitated but then got on after
e shift foreman began telling everyone to get on. He rode
e elevator down without incident, and no one said anything
rther about it (Tr. 254).

On cross-examination, Mr. Sunyak stated that his initial
luctance to board the elevator was prompted by his doubts
to whether anything was wrong with it. However, since he
ew none of the facts he rode it. He confirmed that prior
December 28, 1982, he had exercised his safety rights in
e past with regard to certain imminent danger situations
t was never disciplined since management recognized the
ngers and took corrective action (Tr. 258).

Mr. Sunyak stated that before he got on the elevator
December 28, he was not aware that employees from the
eceding shift had reported a "drop" while they were coming
t. He confirmed that he worked on the same shift with
. Hogan and Mr. Ventura, but did not know at that time
at they had refused to ride the elevator (Tr. 259-260).
also indicated as follows (Tr. 267):

> JUDGE KOUTRAS: Did you hear anything from the previous shift coming up?
>
> THE WITNESS: No, I had no knowledge of anything.
>
> JUDGE KOUTRAS: The only knowledge that you had, was the night before, there was a problem?
>
> THE WITNESS: Yeah, but that was more or less unusual, if that would be the right word, but just little things like that happen every now and then, but I was probably more concerned about getting home, than anything else.
>
> JUDGE KOUTRAS: But while you were waiting to ride the elevator down, you knew that

could, not knowing any specifics on it.

Thomas Barrett, respondent's employee relations represent confirmed that he was at the mine on December 28, 1982, and wa aware of the elevator problem. He identified exhibit G-3 as a memorandum he prepared from his own personal notes relating to the events of December 28, and he confirmed that he was present when Mr. Hager informed Mr. Willis that he had changed his mind about offering to transport Mr. Hogan and Mr. Ventura into the mine through the slope (Tr. 273-276).

Respondent's Testimony and Evidence

John F. Lusky, testified that he is employed by the Schindler Haughton Elevator Company as an elevator mechanic, and he described his duties and experience. He confirmed that he received a service call on the afternoon of December 2 1982, and he went to the mine in response to information that there was a "problem with the elevator not automatically returning to the top, and that it had made a stop. It was traveling up, and it made a stop" (Tr. 288). Mr. Lusky identified exhibit R-1 as a copy of a service record indicatir the work which he performed on the elevator in question, and he estimated that he arrived at the mine at 6:00 p.m. He confirmed that he found no malfunction with the elevator while he was there, but did indicate that he visually inspected the elevator, adjusted some switch contacts, and he changed a relay contact since he believed it had something to do with returning the car to the top. While he indicated that it was possible that the contactor was related to the elevator stopping, he did not believe this was likely because there is very little current passing through the contactor (Tr. 292) He also explained the adjustments he made to certain switches, and confirmed that the work he performed on the elevator did not relate to or affect the safety features of the elevator. He also confirmed that the safety features were not by-passed or "jumpered out", and he could not determine what caused the elevator to stop (Tr. 293).

Mr. Lusky stated that during the time he was at the mine the elevator was safe. Based on the work he performed on the elevator, he was of the opinion that it was safe earlier in the day. He confirmed that the elevator will not run if the doors do not close properly, and in his

On cross-examination and in response to further questio Mr. Lusky explained the functions of the elevator relays and contactors, and he confirmed that he had not previously done any work on the elevator in question. He confirmed that he spoke with no one who had ridden the elevator and that he considered his service call to be "routine." He also indicated that any prior service calls would be a matte of record, but he could not recall exactly when the elevator was first installed. He confirmed that an elevator could stop for a number of reasons, and conceded that such a stop would be an "unusual event" (Tr. 311).

Willard D. Smith, shift foreman, testified that on December 27, 1982, when he rode the elevator down at 5:30 th doors would not shut and the elevator would not go up. He reported this to the maintenance foreman, and the elevator was operated manually until the problem could be taken care of. The elevator was repaired, but he did not know what wor was done on it. He reported to work for the second shift on December 28, and prepared to load the elevator to send the crews underground. He was not present when the elevator stopped while coming up and he spoke to no one who was on that elevator. He stated that "I had heard through the mair tenance that they had trouble with the elevator," and he was present when Mr. Rebottini came up on the elevator and he heard him state "it worked fine." Mr. Smith did not speak with Mr. Rebottini, and after he got off the elevator the evening shift began loading on the elevator (Tr. 324).

Mr. Smith stated that no one told him that the elevator had stopped and he heard no one waiting to load on his shift state that they thought the elevator was unsafe. Three elevator loads went underground while he was there and the elevator did not malfunction. Mr. Smith described his conversations with Mr. Hogan and Mr. Ventura as follows (Tr. 325-327):

> Q. Now, there came a point when Ventura and Hogan approached you?
>
> A. Yes, they did.
>
> Q. What did they say to you.

A. I said, "We observed an elevator ride, but I can't guarantee anything."

Q. Did you, at that point, feel that it was safe to ride?

A. Yes, sir.

Q. Did Mr. Ventura and Mr. Hogan raise the fact that they had heard that the elevator had dropped?

A. I don't recall it. No.

Q. Had you heard from anybody else, at that point, that the elevator had dropped?

A. No. I didn't.

Q. Did either Ventura or Hogan raise to you the issue of the previous malfunctions on the elevator as making it unsafe?

A. No, they didn't.

* * *

Q. Yes, assuming that Ventura and Hogan came up to you and said, "We heard that it dropped fifty to a hundred feet" would you have behaved different

A. No.

Q. And that's because you had heard that it was running properly at that point?

A. Fine, Right.

Q. Did you have any further conversation with Vent and Hogan?

A. Not after that, no sir.

soon as they arrived in the office, I stepped inside, and I had a phone call, and I had to leave. And that's all that I --. What happened in the office, I don't recall. I wasn't in there.

Q. Were you involved in assigning them other work?

A. Yes, sir.

Q. Did you ride that elevator that day?

A. Yes, sir.

On cross-examination, Mr. Smith stated that he surmised something had been wrong with the elevator when he saw Mr. Rebottini "test ride" it, but he was sure it was fine when Mr. Rebottini got off. Mr. Smith confirmed that approxim 80 miners rode the elevator into the mine after 4:00 p.m. on December 28, and he also confirmed that he was present by the elevator doors when the 8:00 a.m. to 4:00 p.m. shift came out (Tr. 332). He denied speaking with Charles Cooper, Donald Dowling, or Patrick Buttermore, and denied hearing any comments that there was anything wrong with the elevator (Tr. 334). He also denied hearing any comments that the elevator had dropped or that men were screaming when it did (Tr. 335-336).

In response to further questions, Mr. Smith indicated that Mr. Hogan and Mr. Ventura had served on his crew for two years and that during this period they had never asked him to "guarantee" their safety, and he conceded that this was an "unusual occurrence". He conceded that Mr. Ventura and Mr. Hogan were concerned when they refused to ride the elevator, and when asked about this concern on their part, he replied "I guess they were reluctant because of the situati that happened on the day shift. That's the only reason I can say" (Tr. 339). When asked what he would have done had he been told that the elevator stopped or dropped, Mr. Smith replied "if the maintenance people that was checking the elevator told me it was safe and okay to operate, then I would have expected them to go to work" (Tr. 340). He explair further at Tr. 341:

been, once they got on, something could happen, some unforseen thing, or something.

THE WITNESS: It could have malfunctioned.

JUDGE KOUTRAS: Is that the context in which you made the statement that you can't guarantee their safety?

THE WITNESS: Right. I could have put them on it, and the doors may have malfunctioned, anytime.

JUDGE KOUTRAS: But, in any event, once you got on and went down, you went down without any problem

THE WITNESS: Fine.

JUDGE KOUTRAS: And, how about coming back at the end of the shift?

THE WITNESS: Yes. It worked fine. To my knowledge no one had reported anything.

Mr. Smith confirmed that he had no similar problems with Mr. Hogan or Mr. Ventura in the past and that he considered them to be good conscientious employees. When asked whether he would have ridden the elevator given the same circumstances Mr. Smith replied as follows (Tr. 342):

JUDGE KOUTRAS: Let me ask you this hypothetical. It might be tough to answer, but put yourself in their position, what would you have done?

THE WITNESS: I would have rode the elevator.

JUDGE KOUTRAS: For what reason?

THE WITNESS: Because everyone else rode it, and I would have felt that --. I would have rode it too. I would've felt that it was safe once it was checked out, to ride.

Wayne S. Bair, maintenance foreman, testified that he worked the day shift on December 28, 1982, and was on the

t dropped, he said nothing to Mr. Hager about any reported rop.

Mr. Bair stated that at no time did he hear anyone tate that the elevator had dropped. He confirmed that a eek prior to the hearing Mr. Kessler remarked that he thought he elevator had dropped and while Mr. Bair disagreed with im he told Mr. Kessler "to tell them the way he really feels" Tr. 349). Mr. Bair also confirmed that he did not speak ith Mr. Hogan or Mr. Ventura on the day in question.

In response to further questions, Mr. Bair stated that hen the elevator stopped he felt "a little light", but that is knees did not buckle and his feet never left the floor Tr. 350). He indicated that "I think some people had some retty big eyes, . . . but outside of that everything was retty quiet right after that, until they made the elephone call" (Tr. 353). He said that he would have ridden he elevator again "once it was checked".

Adren A. Whitehair, maintenance clerk, testified that hile he was not directly involved in the repair of the elevator n December 28, 1983, he was aware of the problems that day. e confirmed that a Haughton elevator representative and surface lectrician Scott Kramer had performed some work on the elevator the morning of December 28, and that no other problems eveloped until late in the afternoon. He received a call rom the bottom of the elevator which indicated that the oors would open and close but that the elevator would not ork properly. He contacted Jackie Smith in the shop, and r. Smith and shop mechanic Jim Howard checked the elevator, nd they "recycled" it by turning the power on and off. They hen tested it by "two dry runs" and it worked properly. owever, ten to fifteen minutes later the doors malfunctioned nd Mr. Smith recycled it a second time, and after testing t he indicated that it was working (Tr. 358).

Mr. Whitehair testified that after the first elevator alfunctions were taken care of he received a call that the levator had stopped. Mr. Petros advised him that it stopped pproximately 100 feet from the top of the shaft and he said othing about any drop. Mr. Whitehair then went to the penthous nd Jackie Smith was checking the contactors. The elevator

which purportedly dropped (Tr. 362).

In response to further questions, Mr. Whitehair stated that if he had been told that the elevator had dropped he would not permit anyone to ride it. He characterized a "dro as the "free-falling of an elevator", and the distance would not make any difference. When asked how he would account fo such differences of opinions as to the purported drop of the elevator, he replied "That's hard to say, but I will say that when an elevator stops when its traveling at speed, that you will get light-footed, of course" (Tr. 366).

Jackie T. Smith, maintenance foreman, testified that his work experience includes some five years of inspections of the elevator in question. He identified exhibit R-2 as a copy of an inspection form dated December 28, 1982, for the elevator in question, and he confirmed that it was executed by mechanic Scott Kramer. Mr. Smith explained all of the required inspection steps listed on the form, and he explained the safety features of the elevator, and he confir that operating it on a manual speed does not result in any loss of safety (Tr. 371-379).

Mr. Smith confirmed that he was present on the morning December 28, 1982, when work was done on the elevator during the day shift. He stated that he received a call at 3:05 p. advising him that the elevator was stuck on the bottom. He checked the switches, ascertained that the safety features were operative, and after recycling the power and making some test runs the elevator operated properly. Shortly thereafter he was again informed that the elevator doors wou not function properly, and since they couldn't close the elevator would not run. He recycled the power again and the elevator worked properly. Shortly after this, the eleva stopped and he could see it from his vantage point in the penthouse. As soon as the elevator stopped, the brakes set and he observed no slippage. He then turned it on the manua mode and Mr. Petros called him. Mr. Smith said that he info Mr. Petros that "We're going to bring you up manual mode" (Tr. 383).

Mr. Smith stated that he immediately brought the elevat up on manual mode to avoid "waiting time" while he recycled the power. Had there been any malfunction of the safety

owever, it was his opinion that the elevator was safe to perate. He later encountered Mr. Hogan and Mr. Ventura and hey asked if he had found the problem. Mr. Smith responded hat he had found nothing wrong with the elevator, and in esponse to a question as to whether it was safe to ride, r. Smith stated that he responded "it was the safest piece f equipment in the mine" (Tr. 386). Mr. Smith could not tate whether Mr. Hogan or Mr. Ventura said anything to him bout the elevator dropping.

Mr. Smith stated that he was present when the Haughton levator representative arrived to check out the elevator, d he confirmed that some contactors were changed but that he mechanic could not specifically identify the malfunction hat caused the elevator to stop (Tr. 388).

On cross-examination, Mr. Smith stated that he did not peak to any of the miners who were on the elevator when it topped. He identified a copy of his previous statement given o an MSHA special investigator, exhibit G-4, and confirmed at his statement indicated that he told Mr. Hogan and r. Ventura that he "didn't know what the problem was". When sked whether there was a difference in telling them that there's no problem", as opposed to telling them that he didn't know what the problem was", he replied "I'd say that's etty close to the same thing" (Tr. 395).

In response to further questions, Mr. Smith stated that om his position in the penthouse at the time the elevator topped he would have been able to observe any drop. While could not see the actual cage, he could observe the cables nd would have seen any slippage of the elevator motor or ead frame. He confirmed that he was standing at the penthouse the elevator braking device when the motor stopped and e heard the brakes set, and had the elevator dropped he uld clearly have seen the cable drop (Tr. 404). When asked explain why some of the miners described the stop as a rop, he replied "I've been on it when it stopped before, and t gives you a sensation of rising and then falling down, ravity" (Tr. 404). He also confirmed that from his position e could hear no shouts or screams from inside the elevator age.

James S. Conrad, Jr., MSHA Federal Mine Inspector,

John Lusky who advised him that none of the safety devices were "jumpered out". Mr. Lusky also advised him that the elevator was safe to operate, and Inspector Conrad confirmed that he issued no citations or violations (Tr. 411).

Allen E. Hager, General Mine Foreman, testified that he was aware of the fact that on December 27 and 28, 1982, the elevator in question was experiencing problems. There was a problem with the doors on December 27, and it was taken ca of. The problems early in the day on December 28, were also with the doors, and the midnight shift came out of the mine by means of the slope, and this was because the elevator representative was trying to find out what was wrong with the elevator (Tr. 425). The decision to call in the mechani had nothing to with the safety of the elevator because the elevator could have been used and any malfunctions had nothi to do with its safe operation (Tr. 426).

Mr. Hager confirmed that on the morning of December 28, the malfunctioning elevator doors had been repaired, but another malfunction occurred at approximately 3:00 p.m. that day, and this was again connected with the doors. He later learned that the elevator stopped as it was coming up with a load of miners. When he was informed of this incident, he proceeded to the elevator landing, and learned that Mr. Smit had run some tests and he asked Mr. Smith if anything was malfunctioning and he responded "no" (Tr. 427). Mr. Hager then remained while the evening shift rode the elevator down and prior to 4:00 p.m. no one complained to him concerning the safety of the elevator (Tr. 428).

Mr. Hager stated that he first learned that Mr. Hogan and Mr. Ventura refused to ride the elevator after the day shift had "caged out" and the majority of the afternoon shift had "caged in". Mr. Hogan, Mr. Ventura, and Mr. Denny "confronted him" on the elevator landing and informed him of the fact that Mr. Hogan and Mr. Ventura were exercising their individual safety rights because they believed the elevator was unsafe to ride (Tr. 429). Mr. Hager stated that he offered to "cage them down on in the manual mode" and explained to them that he believed the elevator was safe to ride. His precise words were "there's nothing wrong with the elevator. It's safe to ride" (Tr. 430). He stated that they still persisted in invoking their individual safety rig

e to ride (Tr. 431). Prior to this meeting he (Hager) spoken with Jackie Smith and was informed that the elevator operating properly and that he had found nothing wrong n it. Mr. Hager also confirmed that he had initially ered to transport Mr. Hogan and Mr. Ventura into the e by means of the slope, but subsequently retracted t offer. He retracted the offer after he gave thought to fact that by making the offer in the first place he would placed in a position of saying there was something wrong n the elevator, and as far as he was concerned this was the case (Tr. 432).

Mr. Hager stated that he summoned the federal and state inspe the mine to determine the safety of the elevator because this the procedure dictated by the labor-management contract, ibit R-3 (Tr. 433-435). He also called in the elevator resentative, and Mr. Hager stated that there was no doubt is mind as to the safety of the elevator (Tr. 436-437). confirmed that during his meetings with Mr. Hogan and Ventura concerning their refusal to ride the elevator information was forthcoming concerning the purported vator dropping or the fact that people on the elevator had eamed, grabbed other people's arms, or that legs had kled (Tr. 437).

Mr. Hager confirmed that he met with Mr. Willis, Hogan, and Mr. Ventura and informed them collectively t he was suspending Mr. Hogan and Mr. Ventura for their usal to ride the elevator. He further confirmed that the pensions were made in accordance with the contract which orizes such suspensions if it is determined that the per state and federal inspection officials confirm that work conditions on which the refusals are based did not stitute violations. Further, it was his view that Mr. Hogan Mr. Ventura did not act in good faith because the elevator operating properly at the time of their refusal to ride and that approximately 160 miners oaged in and out of the e on the very same elevator at the same time as the k refusal (Tr. 441-442). When asked what he would if he had been told that the elevator dropped 50 to 100 t, Mr. Hager responded as follows (Tr. 445):

> A. Well, I'd investigate the incident with the peo le that allegedly made the statements, and

the offer to take Mr. Hogan and Mr. Ventura down on the elevator by manual mode (Tr. 447). He was aware of the test runs and had no knowledge of any additional malfunctions at the time this offer was made, and he was present when Mr. Rebottini got off the elevator. Mr. Hager confirmed that while he did not draft the suspension notices given to Mr. Hogan and Mr. Ventura, exhibits G-1 and G-2, he signed them (Tr. 450). He confirmed that Mr. Hogan had on one previous occasion exercised his individual safety rights in connection with the elevator, but he was not disciplined and was given alternative work (Tr. 454).

In response to further questions, Mr. Hager denied that Mr. Hogan or Mr. Ventura ever apprised him of any statements made by miners on the elevator that the elevator had dropped any distance, that their knees buckled, that someone grabbed another, or that anyone screamed (Tr. 460-461). If these assertions had been communicated to him he would have shut the elevator down and conducted a thorough investigation (Tr. 461).

Walter A. Petros was called as the Court's witness, and he confirmed that he is employed by the respondent as a maintenance foreman. He confirmed that he was on the elevator in question when it stopped on December 28, 1982, and that he spoke with Jackie Smith over the telephone from the elevator. Mr. Petros stated that after the elevator stopped he heard no one screaming, and he described the demeanor of the miners on the elevator as follows (Tr. 474-475):

> Well, I would say, just like everybody else, it was a shock at first, you know, because just like going in any other elevator that comes up to the floor, it sort of, you know, your stomach sort of feels uneasy to start with, and then it just settles back down when you come to a pretty fast stop. But, I know myself, it's happened two or three times that when you're going down somebody'll accidentally hit the stop button. And it does the same thing. It gives you a jolt. And as soon as it did that, you know, like I said, everybody was probably scared at first, but as soon as it did that, and it did it, you realized what happened, or I did. And then I went over to find out that, you know,

he replied as follows (Tr. 476):

> Not right -- . You know. I don't know. Like I said, I was trying to get to the phone and, I mean, I didn't actually pay any attention to what everybody was saying. But, some people are more susceptible to panic than others. So, you know, I mean --. I think, what happened is when it did stop and then I got on the phone and talked to Jackie and it started back up, I don't really think there was time for --, you know, if it would have set there for maybe 10 or 15 minutes, then you might have got the people into a little panic situation.

Mr. Petros confirmed that after he got off the elevator he went to the bathhouse but did not speak with Mr. Hogan or Mr. Ventura, and he remembered speaking to no one else, nor did he remember observing anyone talk to any management people (Tr. 477).

Findings and Conclusions

The critical issue in this case is whether the refusal by Mr. Hogan and Mr. Ventura to ride the elevator underground to their work stations because they believed it was not safe is protected by Section 105(c) of the Act. Although Mr. Hoga and Mr. Ventura were assigned other work after the refusal, since the elevator was the normal means for transporting them underground to their assigned duty stations, their refusal to ride the elevator constituted a work refusal.

Refusal to perform work is protected under Section 105(c if it results from a good faith belief that to go ahead with the assigned work would expose the miner to a safety hazard, and if the belief is a reasonable one. Secretary of Labor, ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (October 1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 802, 2 BNA MSHC 1213 (April 1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982). Further the reason for the work refusal must be communicated to the mine per r. cret v. f Labo ex el. Dunmire and Estle

argument that any standard used to assess the legitimacy of a miner's work refusal must be an objective one suppor by ascertainable evidence. The Commission followed its previously adopted standard that the miner's honest perce of a hazard be "a reasonable one under the circumstances The Commission also rejected a suggestion that it articul a standard as to how severe a hazard must be in order to a miner's right to refuse to work, and opted to rely on "gradual development of the law in the cases contested be us."

In the Pratt case, the Commission considered the mi perception of the hazards involved when he refused to fi a battery fire and refused to agree to attempt to extingu future fires under similar circumstances. The Commissio found that Pratt feared an explosion of the batteries in question would throw shrapnel and acid over him and migh kill him, and they affirmed the Judge's finding that Pra reasonably believed in a serious risk of injury from an exploding battery. Citing Bush v. Union Carbide Corp., FMSHRC 993, 998 (June 1983), the Commission held that on a reasonable good faith fear in a hazard is expressed by miner, the operator has an obligation to address the perc danger, 5 FMSHRC at 1534.

After review of the circumstances surrounding Pratt work refusal, the Commission found that the mine operato explanation or attempt to address his fears did not inclu specific information or support as to why fighting the b fires may not have been as dangerous as Pratt believed. Commission affirmed the Judge's finding that the operato violated Section 105(c) of the Act by discharging Pratt his refusal to perform a task still reasonably believed by him to be dangerous.

The facts and circumstances surrounding the work re in the Pratt case are different from those presented in instant case. In addition, it seems clear to me that co to the position taken by the mine operator in Pratt, the operator in the case at hand took positive and affirmati steps to address the concerns articulated by Mr. Hogan a Mr. Ventura, and my reasons for this conclusion follow b

Mr. Ventura and Mr. Hogan were not on the elevator

ggerated the extent of the purported drop. Mr. Ventura testified that he believed eight miners may have been the elevator with Mr. Kessler, but heard no comments anyone else indicating that the elevator dropped.

Mr. Kessler denied that he told Mr. Ventura that the vator dropped 50 feet. He then testified that he may e said it fell six to eight feet, and when asked to ncile his prior signed statement to the MSHA investigator t it dropped 10 to 15 feet, Mr. Kessler stated that since as enclosed in the cage "I can't tell you how far the dropped."

Mechanic trainee Don Dowling and continuous miner ator Charles Cooper, who were also on the elevator, ieved that the elevator rose, stopped, fell, and then ped again. Mr. Dowling did not state how far it fell, while Mr. Cooper said it may have fallen eight to 10 t, he also said "we couldn't judge the distance it fell."

Mr. Dowling stated that after he got off the elevator, did not speak with Mr. Hogan or Mr. Ventura because he not know them. He also stated that he said nothing ut the incident to mine management. He returned to work next day, rode the elevator, and he indicated that "it ked fine."

Mr. Cooper stated that after he got off the elevator, poke with safety committeeman Willis, but simply told "there's something wrong with the elevator." However, Cooper said that he did not see or speak with Mr. Hogan Mr. Ventura at that time. Mr. Cooper returned to work next day and rode the elevator without incident.

Shuttle car operator Mark Sunyak, who worked the same ft as Mr. Hogan and Mr. Ventura on December 28, testified he rode the elevator down on the first trip and that he d no one from the preceding shift mention anything about elevator dropping.

Shift foreman Dennis Smith loaded three trips on the vator during Mr. Hogan's and Mr. Ventura's shift, and the

reman Jackie T. Smith was at the elevator controls when
stopped. He observed nothing in the cable mechanism
ich would lead him to conclude that the elevator dropped.

Mr. Hogan admitted that before telling Dennis Smith
at he refused to ride the elevator, he was aware that
veral elevator trips were made underground with other crew
mbers and that he observed no evidence of any elevator
lfunction. Mr. Hogan also conceded that after the asserted
evator dropping incident, he did not ask Dennis Smith,
ckie Smith, or Alan Hager whether they had checked the
evator to determine what was wrong with it.

At no time during his direct testimony did Mr. Hogan
er indicate that he specifically informed anyone in mine
agement about the purported elevator dropping prior to, or
the time of, his work refusal. On cross-examination,
. Hogan conceded that he did not mention the purported
evator dropping to Dennis Smith or Jackie Smith. As for
. Hager, Mr. Hogan testified that he "believed" he mentioned
to Mr. Hager, but was not certain.

Mr. Ventura testified that he mentioned the elevator
pping to Dennis Smith, Jackie Smith, Alan Hager, and his
ction foreman Clark. When asked whether he specifically
ntioned to Mr. Smith and Mr. Clark that someone had told
m that the elevator dropped fifty feet, Mr. Ventura replied
es." He then testified "* * well, I didn't say fifty feet,
that it had dropped." He also indicated that he did
identify the person who had told him about the drop to
. Hager, and that Mr. Hager advised him that he was not
are that the elevator had dropped.

Respondent's testimony and evidence establishes that
er the complainants informed Dennis Smith and Alan Hager
at they were exercising their individual safety rights
refusing to ride the elevator, both Mr. Hager and Mr. Smith
sured them that the elevator was safe. Mr. Hager testified
at had he been informed that the elevator had dropped 50
100 feet, he would have shut it down as an imminent danger
d prohibited anyone from riding it. While it is true
at miners are not necessarily required to accept mine managemen
aluation of a perceived hazard, on the facts of the instant

While it may be true that Mr. Hogan and Mr. Ventura communicated "their fears" about the elevator to several management members, MSHA's inference at page 8-9 of its brief that they articulated any specific concerns about the purported elevator dropping to either Mr. Hager, Mr. Dennis S or any other management representative is rejected as unsupported by any credible testimony.

While it may be true that Mr. Hager and Mr. Dennis Smith had reason to know that the elevator had malfunctioned prior to the work refusal, I cannot conclude that Mr. Hager's reactions to the complaints by Mr. Hogan and Mr. Ventura were unreasonable in the circumstances. He summoned an elevator serviceman from the manufacturer, dispatched a maintenance foreman to the elevator penthouse to try to find the problem, and also summoned a Federal and state mine inspector to the scene. He also offered to operate the elevator in a manual mode so as to transport Mr. Hogan and Mr. Ventura underground without resort to the automatic elevator controls. In the meantime, several elevator trips were made underground with the rest of the shift, and the union president himself made two "test runs" on the elevator and found nothing wrong with it. All of these events were known to Mr. Hogan and Mr. Ventura prior to the work refusal. Mr. J.T. Smith, an experienced maintenance foreman who had gone to the elevator penthouse to check it, assured the complainants that he found nothing with it and that it was safe. This was communicated to Mr. Hogan and Mr. Ventura prior to the work refusal.

No cause for the stopping of the elevator was ever found. While there was speculation that a faulty contactor relay may have caused the elevator to stop, at no time were any of its safety features inoperative, and the relay was replaced. Further, the inspection by the Fedcral and state mine inspector revealed no safety infractions, and did not result in the issuance of any citations.

Safety committeeman Willis believed that mine management acted reasonably in summoning an elevator mechanic and the Federal and state inspectors. He commented that he had ridde the elevator many times and that "anytime that elevator malfunctions it is a headache for both management and union, it causes a lot of concern."

The complainants' failure to bring the purported hazardo elevator condition to the attention of a mine safety committe who was present for work on the same shift remains unexplaine A possible answer may lie in the fact that the complainants may have expected a "collective" work refusal by the entire shift not to ride the elevator. When this failed to materialize, the complainants invoked their own individual safety rights.

I find it rather surprising that the complainants would not bring the purported elevator "dropping" condition to the immediate attention of the safety committeeman who was present at the scene. Rather than doing this, the complainan waited until they were summoned to the mine foreman's office before involving safety committeeman Willis. The failure by Mr. Hogan and Mr. Ventura to immediately bring the purport 50 to 100 foot elevator drop to the attention of their safety representative is not only irresponsible, but casts serious doubts on their credibility and motivation in refusing to rid the elevator.

While it is true that there were elevator problems on December 27, and earlier during the day shift on December 28, the fact is that those problems involved malfunc of the doors which had been corrected prior to the work refusal in question. Further, both Mr. Hogan and Mr. Ventura rode the elevator out of the mine at the end of their shift on December 27, and they encountered no problems.

Mr. Hogan confirmed that by the end of his shift on December 27, the elevator problem had been repaired, and that such repairs were made within ten or fifteen minutes after he heard about it. He also testified that when he later spoke to mine management (Jackie Smith, Allen Hager, and Denny Smith) on December 28, he did not ask them about the December 27 problem.

Mr. Ventura confirmed that he knew that the reported elevator malfunction of December 27 had been repaired. As a matter of fact, he testified that since the elevator was the main escapeway, his foreman granted his request to leave the mine early if the elevator were not repaired within a

In view of the foregoing, I conclude and find that the lier problems with the elevator on December 27, cannot ve as a basis for any reasonable good faith belief that elevator was hazardous at the time of the work refusal ediately prior to the work shift on December 28.

With regard to the elevator door problems of December 28, ch delayed the day shift from entering the mine until roximately 10:00 a.m., testimony from several men on that ft (Kessler and Dowling), maintenance personnel (Whitehair Jackie T. Smith), and mine foreman Hager, reflects that irs were made. The day shift then used the elevator to er the mine, and that they did so without experiencing problems. Under these circumstances, although Mr. Hogan Mr. Ventura may have learned about these problems though eral bathhouse conversations after the day shift came of the mine on December 28, at the end of the shift, I ot conclude or find that these earlier problems contributed or formed a basis for, any reasonable good faith ef that the elevator was hazardous at the time of their sal to use it.

Based on a careful reivew and scrutiny of all of the timony and evidence in this case, I conclude that the possible basis for the complainants' belief that an vator hazard existed is the information given them by ain day shift miners who were on the elevator when it rtedly "dropped." The essence of the work refusal lies he contention by Mr. Ventura and Mr. Hogan that, not ving what caused the reported "drop," they were not willing hance a possible repeat incident.

Mr. Ventura testified that it was possible that he d not have refused to ride the elevator had Mr. Kessler mentioned the purported "drop." When asked whether he d have still refused to ride the elevator if no one had tioned the "drop," Mr. Hogan responded "I don't know, that's othetical."

There is no evidence in this case that the respondent ever retaliated against any miners because they exercised ir individual safety rights. As a matter of fact, Mr. Hogan

Shuttle car operator Mark Sunyak testified that he had previously exercised his safety rights in regard to certain imminent danger situations, but that mine management took corrective action and did not discipline him.

In Dunmire and Estle, supra, the Commission held that a combination of trustworthy first-hand reports from other miners, coupled with the complainant's immediate preceding first-hand experience as to certain hazardous roof conditions supplied a supportable and acceptable basis for concluding that there was a reasonable belief in the existence of the hazardous conditions. In affirming the Judge's finding that the complainant's work refusal was protected activity, the Commission relied on the record of credible, first-hand, corroborative evidence presented, including the complainant's prior personal exposure to the hazardous roof conditions, and their previous complaints spanning several months.

In the case at hand, I cannot conclude that the circumst faced by Mr. Hogan and Mr. Ventura, were similar to those faced by Dunmire and Estle. Based on a preponderance of all of the credible testimony, I am convinced that Mr. Ventura and Mr. Hogan were not presented with credible first-hand information indicating that the elevator in question would more than likely fall to the bottom of the shaft if they were to ride it. Taken as a whole, the record in this case establishes to my satisfaction that notwithstanding the fact that mine management took reasonable steps to insure their safety, Mr. Hogan and Mr. Ventura took it upon themselv to decide that they were not going to ride the elevator. The fact that their own union representatives rode it, that other members of the crew rode it, and that mine management assured them that it was safe, simply had no impression on them. Given these circumstances, I cannot conclude that the respondent violated their protected rights under the Act. In the final analysis, I believe that Mr. Hogan and Mr. Ventura, faced with a decision that they would have to make as individuals, opted to make a decision that they beli would ultimately vindicate their own individual opinions. However, after close examination of all of the objective testimony and evidence of record, I believe that they were w Accordingly, I cannot make findings and conclusions that wou support their position.

investigator somehow failed to record his entire statement and somehow edited his statement. Mr. Ventura stated that he "was not sure" why he did not tell MSHA's investigator the full story of the purported elevator "dropping."

After viewing Mr. Ventura and Hogan on the stand during their testimony at the hearing, I conclude that they were less than candid in what they told the MSHA special investigator during his investigation of their complaint, as well as what they testified to at the hearing. In short, I simply do not believe that they in fact told the special investigator that they were informed that the elevator had in fact dropped or fallen, and that this asserted event really influenced their decision not to ride it. To the contrary, I conclude and find that Mr. Hogan and Mr. Ventura did not communicate the asserted elevator "dropping" to anyone at anytime prior to their work refusal. Absent this communication, I cannot conclude that their work refusal was reasonable.

Contrary to the situation which existed in the Pratt case supra, I conclude and find that the respondent in the instant case specifically and directly addressed the purported hazardous condition articulated by Mr. Hogan and Mr. Ventura, and it did so in a manner which should have pacified and assured a reasonable person that he was not faced with a choice of riding an elevator that could have been expected to result in injury or exposure to possible harm. In short, I conclude and find that the complainants in this case acted unreasonably in refusing to ride the elevator in question, and that the suspensions meted out for the work refusal were reasonable in the circumstances, and did not violate any protected right under the Act.

Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of a preponderance of all of the testimony and evidence adduced in this case, I conclude and find that the respondent did not discriminate against Mr. Hogan or Mr. Ventura, and their rights under the Act have not been violated. Accordingly, their complaints ARE DISMISSED.

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 82-363
	:	A.C. No. 46-04168-03503
v.	:	
	:	Docket No. WEVA 83-64
KITT ENERGY CORPORATION, Respondent	:	A.C. No. 46-04168-03528
	:	Kitt No. 1 Mine

DECISION

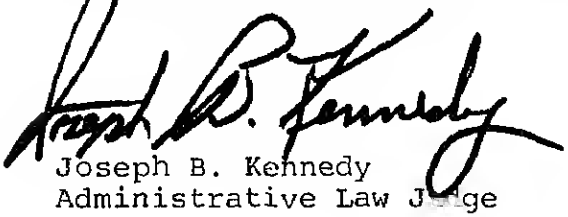
Before: Judge Kennedy

The parties move for approval of a motion withdrawing the captioned penalty petitions on the ground that a review of the videotapes of the condition cited shows the violation charged did not, in fact, occur.

In what came to be known as the case of the "slippery slopes," MSHA charged two violations 75.1704 on the ground that the hand rails on a slope that served as an escapeway were not maintained so as to insure safe passage of the miners at all times. Because the violations were considered "nit-picks," MSHA proposed its usual "wrist-slap" penalty of $20. When the matters, together with others, came on for a prehearing conference, the trial judge suggested that before the parties put the taxpayers and stockholders to further inordinate expense over what both parties conceded were trivial violations they attempt to resolve the matter by making videotapes of miners using the slopes in question to determine the difficulty, if any, involved in climbing through the areas.

The parties agreed to this and after accomplishing the "view" agreed the citations were improvidently issued and shoul be vacated. This having been accomplished the instant motion followed. I conclude the violations charged did not, in fact, occur and that the citations were, therefore, properly vacated.

ereby are, GRANTED and the captioned matters DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

ion:

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 83-237
	:	A.C. No. 46-01283-03518
v.	:	
	:	Hampton No. 3 Mine
WESTMORELAND COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

The parties move for approval of a settlement of the respirable dust violation (2.5 mg/m^3) charged in the captione proposal at a 27% reduction in the amount initially assessed ($225 v. $311).

Based on an independent evaluation and de novo review of the circumstances, I find the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the operator pay the amount of the penalty agreed upon, $225, on or before Friday, January 4, 1984, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 83-89 A.C. No. 36-00970-03512
v.	:	
U.S. STEEL MINING COMPANY, INC., Respondent	:	Maple Creek No. 1 Mine

DECISION APPROVING SETTLEMENT

Appearances: David A. Pennington, Esq., Office of the Solic
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvar
for Respondent.

Before: Judge Broderick

When the above case was called for hearing in Washingtor Pennsylvania, on November 30, 1983, the parties submitted on record a motion to approve a settlement. The MSHA inspector issued the two citations contained in this docket number was unable to be present at the hearing.

One citation was originally assessed at $136, and the pa propose to settle for $50. The violation charged was insuff velocity of air (4,500 cfm when the methane and dust control called for 5,000 cfm). It appears that the low reading was during the mining cycle and that one of the shuttle cars hit line curtain. There was sufficient air at the face before m started. The significant and substantial designation is to

The other citation was originally assessed at $168, and parties propose to settle for $100. The violation charged w the failure to have a trolley wire properly guarded. The pa state that the missing guard was on the narrow or rib side a thus miners were unlikely to contact it.

I accept the representations in the motion and conclude

James A. Broderick
Administrative Law Judge

Distribution:

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December 22, 1983

ECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 84-7-M A.C. No. 09-00067-05503
v.	:	
ULCAN MATERIALS COMPANY - SOUTHEAST DIVISION, Respondent	:	Kennesaw Quarry and Plant

DECISION APPROVING SETTLEMENT

efore: Judge Merlin

The parties have filed a motion to approve settlement n the above-captioned proceeding. The parties propose to ettle the two citations at issue in this case for the riginal assessments total of $4,000.

Citation No. 2243958 was issued for a violation of 30 .F.R. § 56.12-25 because the emergency stop switch for a onveyor belt was not frame-grounded. A miner was electro- uted when he grasped the actuating lever of the emergency top switch. The accident was caused by an electrical fault t the stop switch which occurred due to strain and flexing f the conductors entering the switch housing. The single lt securing the switch to the wall was not sufficient to revent movement of the switch when the cord was pulled. onsequently, the cable pulled out of the strain clamp and he bare or damaged conductors contacted the switch frame. e parties advise that negligence was low because the tatus of the grounding was not visually apparent and had ot been detected despite previous diligent inspections by c operator. The violation was abated in good faith. The ine is medium in size and the operator is large. There is o history of prior violations of the cited standard. ayment of the penalty will have no significant effect on he operator's ability to remain in business. Thc parties ropose to settle this citation for the original assessment $3,000.

advise that negligence was low. The remainder of the statutory criteria set forth in section 110(i) of the Act are as described above. The parties propose to settle this citation for the original assessment of $1,000.

I have very carefully reviewed the settlement motion and supporting materials. Although the violations are exceptionally grave, I note the low degree of negligence and absence of prior violations of the cited standards. Inasmuch as both assessments are substantial amounts, I conclude the recommended settlements are appropriate in this case. The recommended settlements are therefore, approved.

ORDER

The operator is ORDERED to pay $4,000 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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ON BEHALF OF ROBERT K. ROLAND, Complainant	:	MSHA Case No. MD 83-01
v.	:	
	:	Parachute Creek Mine
OIL SHALE CONSTRUCTORS, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Carlson

The Secretary of Labor has filed a motion styled "Motion to Withdraw Proposal for Penalty" in which he seeks to withdra as representative of the complaining miner in this discriminat case, and to withdraw the complaint. (Penalty is mentioned in the title of the motion because the discrimination complaint includes a plea for a civil penalty of $5,000 in addition to remedies for the miner.)

Before I rule upon the motion, certain prefatory matters must be set forth. On December 14, 1983, Robert K. Roland, th complaining miner, came to the offices of the Commission in Denver and spoke to the undersigned judge. He expressed conce the Office of the Solicitor had orally advised him on November 1983 that the Secretary would no longer furnish counsel in his case. He was unsure of the posture of his case since the Solicitor's office had not yet made any filing evidencing an intent to withdraw. As Mr. Roland spoke, he made declarations which touched directly upon the merits of the case. I must regard these declarations as an ex parte communication forbidd by Commission rules. While Mr. Roland was in my belief innoce of any improper intent, I concluded at that time that I should disqualify myself from any further proceedings in the case.

On the following day the Secretary's motion for withdrawa was filed. On December 16, 1983, I initiated a telephone conference call with the counsel for Oil Shale Constructors, coun for the Secretary, and Mr. Roland on the line. At the outset I made known that an ex parte communication respecting the mer had been made, and that I had decided that disqualification wa the only proper action on my part. I did not disclose the con of the ex parte declaration in view of the decision to disqual

motion should all of the parties agree that I should do so, that act would not relate to the merits, and would move the one step closer to possible resolution. All participants we able.

I further advised Mr. Roland that I would give him fift days, if he wished them, in which to file formal objections Secretary's motion to withdraw. Mr. Roland indicated an und of what was involved and affirmatively waived his right to c

I also made clear to the parties my intent to grant the I indicated that a question exists as to whether the Secreta possesses an absolute right to decide whether or not to cont representation, once begun, but that for reasons of practica fundamental fairness I was not inclined to require the Secre particularize his reasons for withdrawal for fear such reasc spread upon the record, might substantially prejudice the co miner's cause should he elect to refile the case on his own

No party contested this reasoning. Consequently, the m is granted, and docket number WEST 83-90-DM is dismissed.

The complaining miner is advised, as he was during the conference, that under my interpretation of the relevant sta provisions and Commission rules, he has 30 days from the iss this order to refile the complaint with the Commission on hi behalf.

John A. Carlson
Administrative Law Judge

Distribution:

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Jon G. Sarff, Esq., Jasper Construction Company
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Plymouth, Minnesota 55441 (Certified Mail)

Complainant	:	
v.	:	Docket No. KENT 84-15-D
	:	
J. COAL COMPANY, INC.,	:	BARB CD 83-39
OHN LINDER,	:	
Rcspondent	:	No. 4 Mine

ORDER OF DISMISSAL

rances: Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Hazard, Kentucky, for Complainant;
S.H.Johnson, Esq., Johnson & Johnson, Paintsville, Kentucky, for Respondents.

e: Judge Melick

At expedited hearings, the Complainant requested val to withdraw his complaint in the captioned case on a satisfactory settlement agreement between the es. Under the agreement, the Complainant receives in promises from the operator as well as payment of 00 for lost wages. Under the circumstances herein, ssion to withdraw is granted. 29 CFR § 2700.11. The is therefore dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

'bution:

Oppegard, Esq., and Martha P. Owen, Esq., Appalachian rch and Defense Fund of Kentucky, Inc., P.O. Box 360, d, KY 41701 (Certified Mail)

ll Johnson, D.F.J. Coal Company, Highway 80, P.O. Box Hindman, KY 41822 (Certified Mail)

Johnson, Esq., Johnson & Johnson, P.O. Box 470,

ADMINISTRATION (MSHA),	:	Docket No. WEST 80-79
Petitioner	:	A.C. No. 42-00094-03008 I
	:	Docket No. WEST 80-128
v.	:	A.C. No. 42-00093-03018
	:	Docket No. WEST 80-152
KAISER STEEL CORPORATION,	:	A.C. No. 42-00092-03013
Respondent	:	
	:	Sunnyside Nos. 2, 1, 3 Mines

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Sol
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
David B. Reeves, Esq., Kaiser Steel Corporat
Fontana, California,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

The above three consolidated cases, involve petitions pr
assessment of civil penalties pursuant to provisions of the F
Mine and Safety Act of 1977 (hereinafter the "Act"), 30 U.S.C
et seq. A hearing on the merits was held in Price, Utah, fol
which the parties filed post-hearing briefs. Based upon the
record and considering all of the arguments of the parties, I
the following decision. To the extent that the contentions o
parties are not incorporated in this decision, they are rejec

STIPULATION

The parties stipulated as follows:

1. Kaiser Steel Corporation (hereinafter "Kaiser") and
Sunnyside Mines Nos. 1, 2, and 3 are subject to the jurisdict
coverage of the Act.

2. Kaiser is a medium sized operator employing 230 mine
producing approximately 3,000 tons of ore daily.

rt of Kaiser in the abatement of citation No. 789800 in Docke
ST 80-152 and citation Nos. 789765 and 789767 in Docket No. W
-128.

Docket No. WEST 80-79

At the commencement of the hearing, the Secretary moved to
hdraw his petition for the assessment of penalties for two
tations in Docket No. WEST 80-79. Counsel for the Secretary
ated that the basis for this motion was an inability on the
cretary's part to prove the alleged violations. (Transcript a
.

There being no objection by Kaiser and pursuant to 29 C.F.
2700.11, 1/, the Secretary's motion was granted and citation
s. 789229 and 789230 are vacated and Docket No. WEST 80-79 is
smissed.

Docket No. WEST 80-152

tation No. 789800

On August 14, 1979, MSHA inspector Gerald Mechtly conducte
spection of Kaiser's underground coal mine identified as the
nnyside Mine No. 3. Ralph A. Sanich, Kaiser's safety special
ompanied Mechtly.

2700.11 Withdrawal of Pleading:

A party may withdraw a pleading at any stage of a proceeding with the approval of the Commission or the Judge.

The standard alleged to have been violated reads in pert part as follows:

> § 75.305 Weekly examinations for hazardous conditions. [Statutory Provisions] In addition to the preshift and daily examinations required by this Subpart D, examinati for hazardous conditions, including tests for methane, a for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the retur of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one of each intake and return air course in its entirety, idle workings, and, insofar as safety considerations per abandoned areas. Such weekly examinations need not be m during any week in which the mine is idle for the entire week, except that such examination shall be made before other miner returns to the mine. The person making such examinations and tests shall place his initials and the and time at the places examined .... A record of these aminations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surfac of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested person

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2/ Section 104(d)(1) of the Act provides in pertinent part a follows:

> (1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that th has been a violation of any mandatory health or safety standard, and if he also finds that, while the condition created by such violation do not cause imminent danger, violation is of such nature as could significantly and s stantially contribute to the cause and effect of a coal other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of su operator to comply with such mandatory health or safety standards, he shall include such finding in any citation

The Secretary argues that there were at least four inspecti
ards in the left half of the 16 right entry of Kaiser's mine wh
ore no dates or initials that would coincide with the pre-shift
ine examiner's book on the surface. He further contends that
ection 75.305 requires an inspection be made once a week of one
ntry of each intake and return air course in its entirety.
urther, that the violation cited here is for a failure to inspe
ther than a record keeping violation, thus the 104(d)(1)
esignation (Tr. 92, 93).

The facts surrounding the inspection which gave rise to the
ssuance of citation No. 789800 are not in dispute. The 16 righ
elt entry is described as a two entry system approximately 6800
eet long. The lower level is designated a travel and intake en
d the upper level as a belt and return entry. The two entries
eparated by pillar blocks with stoppings constructed between th
illars. Doors are located in the stoppings at approximately ev
0 feet with six or seven doors between cross-cuts 29 and 62, t
rea cited here.

Mechtly testified that on August 14, 1979, he and Sanich
aveled the intake entry to an isolation area located between
oss-cut 61 and 62. After inspecting that area, they started b
the return belt entry. It was at this point he observed card
dicating when the area had last been inspected on a weekly bas
e first card without the proper date and initials was observed
ar the isolation door between cross-cuts 61 and 62. It showed
ly 30, 1979 as the last date a weekly inspection was conducted
ree other cards with the same date and initials were observed
e return belt entry at cross-cuts 53, 58, and 46. Based on th
chtly informed Sanich of his concern that there was a violatio
ction 75.305 and that he wanted to go to the surface to look a
e mine examiner's book. They then proceeded to cross-cut 29 a
t the lower intake entry (Tr. 45-49, Exhibits P1 and P2).

The mine examiner's book on the surface indicated that
spections were made in the 16 right entry on August 6 and 13,
r. 50).

1 and 7 indicating that the area had been inspected on August 1
979 (Tr. 33, 34 and Exhibits R1 and R2, A,B,C,D). Based upon
evidence, Kaiser argues that it has proven that a miner's exami-
nation was conducted of the 16 right entry. Also, that standar
75.305 does not require that every card in the return must be
signed.

I reject Kaiser's argument in this case. The standard req
a weekly examination by a certified person in at least one entry
of each intake and return air course in its entirety. In this
the operator had placed cards for the miner examiner to sign in
various locations in the entry. The four cards observed by Mec
in the return entry, without the proper dates and initials to s
that a weekly examination had been made, covered a distance of
approximately 3000 feet or half of that particular entry. Prio
dates and initials had been placed on these cards as late as Ju
30, 1979. I must assume that the operator placed these cards a
those particular places expecting them to be used by the person
certified to do the weekly mine examination.

Kaiser's four cards showing dates and initials for August
13, 1979, submitted as exhibit R-2 (A,B,C and D), were not
persuasive in showing that the proper weekly inspections were m
f the entire area. Kaiser admitted that these cards were retr
approximately three months after the citation was issued. Card
and R-2D were located at the far ends of the entry. When asked
about this, Mechtly testified that the fact that these cards sh
dates that conformed with weekly inspections "indicated that th
mine examiner had access to both ends of that entry to mark tho
cards" (Tr. 64). As to the card marked R-2C, this was supposed
found by Sanich near cross-cut 53 when he went back in December
1979. However, on cross-examination, Sanich testified that in
August 14, 1979, the cards seen between cross-cuts 63 and 29 in
return entry did not have correct dates on them (Tr. 35).

In light of the foregoing, I do not find Kaiser's argument
be credible. It must be assumed that the portion of the return
entry between cross-cut 29 and 63 was not examined by the mine
examiner. Even assuming that the standard 75.305 does not requ
card every few feet, as Kaiser argues, both Mechtly and Kaiser's
safety specialist testified that they did not see a card with p

weekly inspection had occurred.

I have considered the testimony of Tom Dickerson, Kaiser' certified mine examiner, wherein he testified that there were approximately ten cards in the 16 right belt entry and that he not mark each card as he does his inspection. Also, that he m weekly inspection of 16 right belt entry on August 6 and 13, 1 (Tr. 80-81). However, the credible evidence does not support Out of ten cards, in this entry, only one, Exhibit R-2C was presented as evidence to show the examination was made and thi showed a date of August 6, 1979 which was more than a week bef the inspection and a date of August 15, 1979, which was a day Also, Dickerson testified that he was advised by a Mr. Oviatt, Kaiser's mine foreman on August 14, 1979 (the day citation No. 789800 was issued) to stay out of the area (Tr. 78). However, Exhibit R-2C shows that Dickerson was back in the area and dat card and initialed it with his initials "TD" on August 15, 197 Dickerson also testified that he didn't go into the area on Au 14 or 15, 1979 (Tr. 79). No explanation was given at the hear for this discrepancy but it goes towards the credibility of th witness.

I find that a violation of the standard occurred and that a violation constitutes an unwarrantable failure on the part o Kaiser. Kaiser knew or should have known that the cards were being marked in an area of its mine which would alert it to th probability that weekly inspections were not being properly conducted. Other members of mine management would have occasi be in this area and should have observed this. Zeigler Coal Company, 7 IBMA 280 (1977).

I further find that such a violation is of a significant substantial nature as those terms are defined in Cement Divisi National Gypsum Company, 3 FMSHRC 822 (April 1981). That is, finding of whether a violation is "significant and substantial depends on whether there existed a reasonable likelihood that hazard contributed to or would have resulted in an injury of a reasonable serious nature. The purpose of the weekly inspecti provided for in standard 75.305 is to detect hazardous conditi such as deteriorating roof conditions, air currents being bloc off and reversed, and methane accumulations. Any of these conditions could cause serious injury or death to miners in th area, if undetected.

Coal Mine and Safety Act of 1977, 30 U.S.C. § 801 et se
wrote the citations when he observed two shuttle cars a
cleaning up coal in the 15 right belt entry of Kaiser's
No. 1 Mine. Each piece of equipment was cited under 30
§ 75.523-1 (failure to have a panic bar) and 30 C.F.R.
(failure to have a cab or canopy). Kaiser was given un
following day (August 2, 1979) to abate these violation

On August 2, 1979, Caughman returned to the same a
that the three pieces of equipment had been moved to a
the railroad track leading out of the mine. The traili
were disconnected and stored in the cars. Caughman iss
modification for each citation indicating that the equi
been removed from service and that additional time was
remove it from the mine. The abatement period was exte
August 7, 1979 (Exh. R-1).

On August 7, 1979, the inspector returned to the m
the loader parked outside the mine on a rail car and so
the two citations issued on that unit. On entering the
discovered that the two shuttle cars were still undergr
location where he had earlier seen them. Caughman issu
104(b)[3]/ order against each of the four citations issue
two shuttle cars and pinned a red tag on the equipment
to abate the citations within the time designated.

3/ Section 104(b) of the Act reads in pertinent part:

> If, upon any follow-up inspection of a coal or oth
> an authorized representative of the Secretary find
> violation described in a citation issued pursuant
> section (a) has not been totally abated within the
> time as originally fixed therein or as subsequentl
> and (2) that the period of time for the abatement
> be further extended, he shall determine the extent
> area affected by the violation and shall promptly
> order requiring the operator of such mine or his a
> mediately cause all persons, except those persons
> in subsection (c), to be withdrawn from, and to be
> from entering, such area until an authorized repre
> of the Secretary determines that such violation ha
> abated.

3. If violations are found, what is the appropriate penal
e assessed.

iscussion:

Kaiser concedes the fact that neither the loader or two shu
ars were equipped with panic bars, cabs or canopies. However,
ntends that the citations should be set aside because these
achines were not "electric face equipment" within the meaning o
he two cited safety standards and, therefore said standards are
pplicable (Kaiser's Brief at 2).

The facts show that on the day the three pieces of equipmer
ere cited by inspector Caughman, they were being used to clean
oal and rock from the floor of an arched entry. The debris had
allen from between the arches and the area was being prepared f
elt entry. This was located several thousand feet from the nea
orking face.

Rex W. Jewkes, Kaiser's safety engineer, testified that the
onger used loaders, like the one cited here, directly behind th
ntinuous miner in extracting coal. Instead, the continuous mi
oads coal directly into the shuttle cars at the working face.
lso, that all of the shuttle cars used at the working face are
quipped with either cabs, canopies, or panic bars (Transcript
6 and 17).

The specific issue to be decided here, then, is whether the
oader and two shuttle cars being used in this location are requ
o comply with either standards § 75.523-1 or § 75.1701-1 by bei
quipped with either panic bars, cabs or canopies. I am persuad
hat they are.

Safety standard § 75.523-1(a) requires that all self-propel
lectric face equipment which is used in the active workings of
nderground coal mine shall be provided with a device that will
uickly deenergize the tramming motors of the equipment in the e
f an emergency. Section 75.523-1(b) provides that self-propell
lectric face equipment that is equipped with a substantially
onstructed cab which meets the requirements of this part shall
e required to be proveded with a device that will quickly de-

Standard § 75.1710-1 requires installation of protective cab
r canopies on all self propelled electric face equipment on a
taggered time schedule coordinated with descending mining height
t states in pertinent part:

> (a) [A]ll self-propelled electric face equipment, <u>including shuttle cars, which is employed in the active workings of each underground coal mine</u> on and after January 1, 1973, shall, in accordance with the schedule of time specified in subparagraphs (1), (2), (3), (4), (5), and (6) of this paragraph (a), be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls. (emphasis added).

Kaiser argues that the equipment cited here is not electri
face equipment as specified in the above standard for the reaso
that the loader and two shuttle cars were not taken or used inb
the last open crosscut of an entry or a room of the mine. In
support of this argument, Kaiser suggests that "electric face
equipment" is defined in 30 C.F.R. § 75.2(i) as: "'Permissible'
applied to electric face equipment means all electrically opera
equipment taken into or used inby the last open crosscut of an
entry or a room of any coal mine ...." Further, it argues that
applicable legislative history dispels any doubt that the term
"electric face equipment" was only descriptive of equipment use
in the specified geographic area (Kaiser's Br. 4, 5).

I am not persuaded by Kaiser's argument. Both regulations
refer to self propelled electric face equipment and, also, to
shuttle cars specifically. However, the area of use is not sta
to be or restricted only to the face of the mine. Instead, the
area of use is described as the "active workings" of the mine.
30 C.F.R. § 75.2, the drafters of the regulations saw fit to
define what they meant by the terms used. 75.2(g)(4) states as
follows: "active workings means anyplace in a coal mine where
miners are normally required to work or travel." It should be
noted that under § 75.2(g)(i) it defines what a working face me
and states as follows: "[M]eans any place in a coal mine in wh
work of extracting coal from its natural deposit in the earth i
performed during t e mi i g cycle." I feel certain that if the

was considered by the Sixth Circuit Court of Appeals in the cas
of Shamrock Coal Company v. Secretary of Labor, (Reference 6th
Cir. Number 79-3199)(February 9, 1981). The case involved the
issue of where 30 C.F.R. § 75.202 regarding roof support requir
roof support in tunnels leading to the face, or just the face,
under the phrase "working places." The Court stated in pertine
part as follows:

> The mine operator argues that the emphasized portion of this section is only applicable in "working places" within the mine. The term "working place" is defined to be the area of the mine inby the last open crosscut, 30 C.F.R. 75.2(g)(2). Common sense, and the congressio ally expressed purposes of the Act. 30 U.S.C. § 801(a), however, compel us to reject an interpretation of the regulation which would protect workers at the face of the mine, but expose miners to the danger of unsupporte roof in the tunnels they traverse on the way to and fro the working face.

I believe this logic is applicable in the present case.

Kaiser further argues that by description, the two shuttle
cars and the loader are "electric face equipment" and must only
comply with the requirements of the cited regulations if they w
being used or intended to be used at the face. This problem wa
addressed by the Commission in Secretary of Labor v. Solar Fuel
Company, 3 FMSHRC 1384 (1981), wherein they held that "equipmen
which is taken or used inby the last open crosscut" means
equipment habitually used or intended for use regardless of
whether it is located inby or outby when inspected. The
Commission emphasized in Solar Fuel Company that it is not wher
the equipment is located at the time of the inspection that is
important, but whether it is equipment which can be taken or us
"inby." Accordingly, each of these three pieces of equipment
involved in the present case could have been utilized at the fa
if the operator so desired.

Kaiser maintains it no longer used loaders at the face or
it intending to use the two shuttle cars there. However, nothi
would prevent them from so utilizing the equipment at the face
should the requirement of its use arise. I therefore feel that

ings" of the mine. A review of the Act shows that section g)(4) defines "active workings" the same as under the lations recited earlier herein. I do not find that the icable legislative history restricts the authority of the etary to provide regulations governing the use of self powered tric face equipment outside the area of the face. It is ous that by adopting certain provisions of the Act, strict liance was intended for any electric powered equipment taken the last open crosscut of the mine. However, I do not find the standards § 75.523-1 and 75.1710-1 are in conflict here.

In light of the foregoing, I find that Kaiser was in ation of the six citations issued against the three pieces of pment cited here.

The other issue presented in this case is whether the four tions against the two shuttle cars were abated, even though remained underground, by removing the power cable from the r source and storing the cable in the boxes on the machines.

The Secretary argues that the shuttle cars were still lable for use and that it would only take minutes to plug the ling cables into the power source located approximately 150 away and the machines would be back in service (Secretary's f at 4).

Kaiser argues that the two machines had not been used since withdrawal from service and that there is no requirement that ctive equipment be removed and taken to the surface to titute abatement. Kaiser also contends that the Secretary's ance on the Commission's decision in Ideal Basic Industries, 2 RC 1242 (April 1981), is misplaced (Kaiser's Br. at 14).

I disagree with this argument as I find the Commission's ng in Ideal Basic Industries plainly supports the Secretary's ment here. In Ideal Basic, the equipment cited was a track le with one of two hydraulic couplers defective. The operator ed that the track mobile was not used in its defective ition after it was cited. The Secretary argued that tho ine had been used, using the non-defective coupler, and that d affect safety. The Commission agreed and stated further as ows:

used to move--are loaded. It was neither tendered in operable nor in the repair shop. To preclude citation because of "non-use" when equipment in such condition is parked in a primary working area could allow operat easily to use unsafe equipment yet escape citation mer by shutting it down when an inspector arrives.

This same conclusion can be applied in the case of the tw shuttle cars. They were in the area and available for use by taking out the power cables and plugging them into the transfe It could take only an estimated five minutes of a miners time put them back in service.

The Commission in Ideal Basic stated that its decision wa consistent with that in Eastern Associated Coal, 1 FMSHRC 1473 (October 1979), which involved placing a danger tag on a defec jitney that remained operable in the working area. The Commis stated in that case:

> We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored. 1 FMSHRC at 1474. The reasoning of Eastern Associated is applicable here as well, where there was not even a danger tag placed on the defective coupler.

In light of the foregoing, I find that the same reasoning must be applied in the present case. There was no danger tag either of the shuttle cars and either one could have been retu to service, either unintentionally by a miner unaware of the citations, or intentionally if such were the need or desire of operator. Therefore, I find that the citation was not abated required under 104(b).

Penalty

The six criteria for assessing a penalty are set out in 3 U.S.C. § 820(i). The parties have previously stipulated as st before regarding the jurisdiction, size of the operator, and t assessment of reasonable penalties in this case would not affe their ability to continue in business.

posure of injury or death from the lack of either a cab or can on any of the equipment.

I find that by removing the loading machine to the surfac Kaiser evidenced good faith in abatement of the two citations against it. However, in failing to remove the two shuttle car from the mine within the time specified initially and subseque extended for termination of the four citations issued against them, I find that Kaiser did not evidence good faith and incre penalties to be assessed herein is warranted.

As to the six citations involved herein, I find the follo penalties to be appropriate:

Citation No.	30 C.F.R. Standard	Description	Penalty
789765	75.523-1	(loading machine, no panic bars)	$ 50.00
789767	75.1710-1	(loading machine, no cab or canopy)	50.00
789768	75.1710-1	(shuttle car ET 7314 no cab or canopy)	100.00
789778	104(b)	(failure to abate)	
789769	75.523-1	(shuttle car ET 7314 no panic bars)	100.00
789777	104(b)	(failure to abate)	
789770	75.523-1	(shuttle car ET 7065 no panic bars)	100.00
789775	104(b)	(failure to abate)	
789771	75.1710-1	(shuttle car ET 7065 no cab or canopy)	100.00
789776	104(b)	(failure to abate)	
		Total	$500.00

I have elected to reduce the amount of the Secretary's proposed penalties in the above six citations for the reason t I do not find that Kaiser's negligence in this case was gross.

ations were issued. Therefore, I do not find any indication of lations of the initial citations.

ORDER

Accordingly, in Docket No. WEST 80-79, citation Nos. 789229 789230 are VACATED and the case is DISMISSED. In Docket No. 80-152, citation No. 789800 is AFFIRMED, and Kaiser is RED to pay a civil penalty of $210.00. In Docket No. WEST 28, the six 104(a) citations and the four 104(b) orders are RMED and Kaiser is ORDERED to pay civil penalties totaling .00 therefore. Kaiser is ORDERED to pay the above civil lties totaling $710.00 within 40 days of this decision.

Virgil E. Vail
Administrative Law Judge

ribution:

lis K. Caldwell, Esq., Office of the Solicitor
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket Nos. PENN 82-218
	:	PENN 82-219
	:	A.C. Nos. 36-00970-03122
v.	:	36-00970-03125
UNITED STATES STEEL MINING COMPANY, Respondent	:	Maple Creek #1 Mine

DECISION

Before: Judge Fauver

These proceedings were brought by the Secretary of Labor under Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The cases were consolidated and heard in Pittsburgh, Pennsylvania.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent operated an underground coal mine, known as Maple Creek No. 1, in Pennsylvania, which produced coal for sales in or substantiall affecting interstate commerce.

Citation No. 1145282
Docket No. PENN 82-218

2. On February 25, 1982, Federal Mine Inspector Francis Wehr issued to Respondent Citation No. 1145282, under Section 104(a) of the Act, charging a violation of 30 CFR 75.1405. That section provides, in pertinent part:

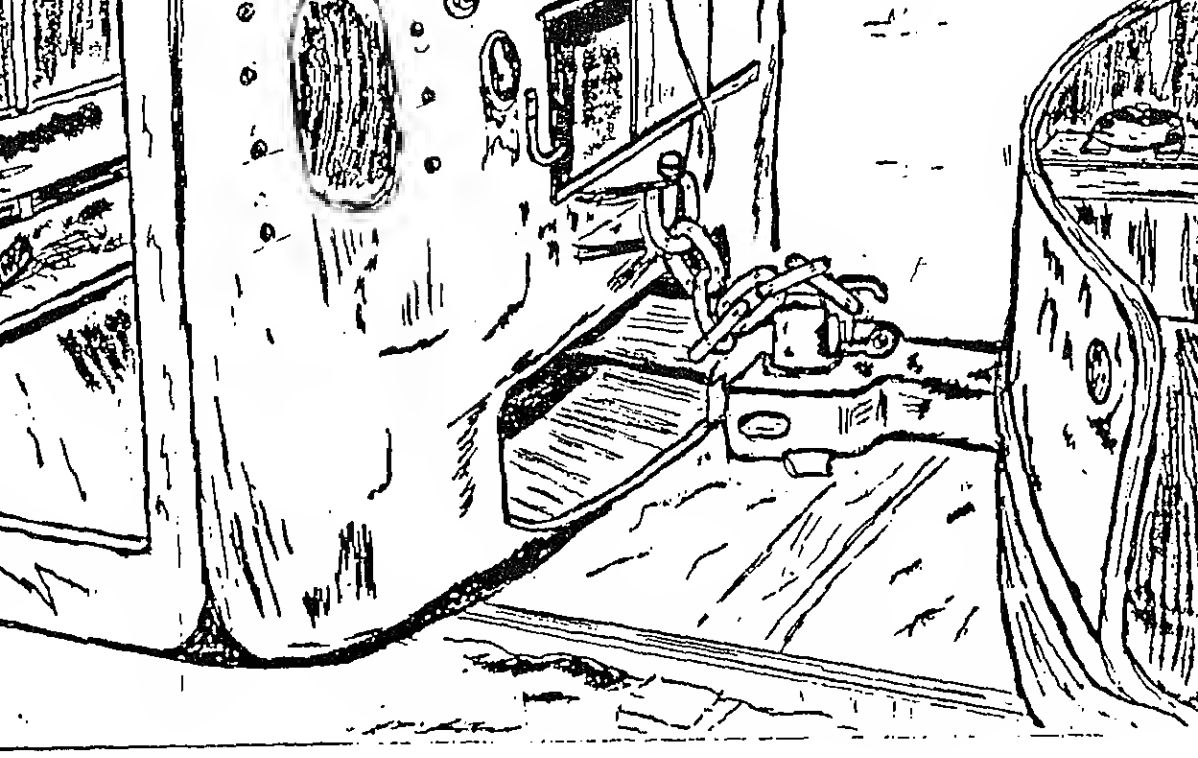
> All haulage equipment... shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment.

3. Inspector Wehr issued the citation because two motives were coupled to a personnel car with safety chains ddition to automatic couplers. Personnel were required to h between the ends of the cars to connect or disconnect chains. The couplers and chains are indicated in the ngs (Joint Exhibits 1 and 1-A) reproduced at page 3.

4. The automatic couplers coupled on impact. They were upled by a hand-lever near the top of the wall of the motive (which was pulling or pushing the personnel car). approved use of the hand-lever for uncoupling.

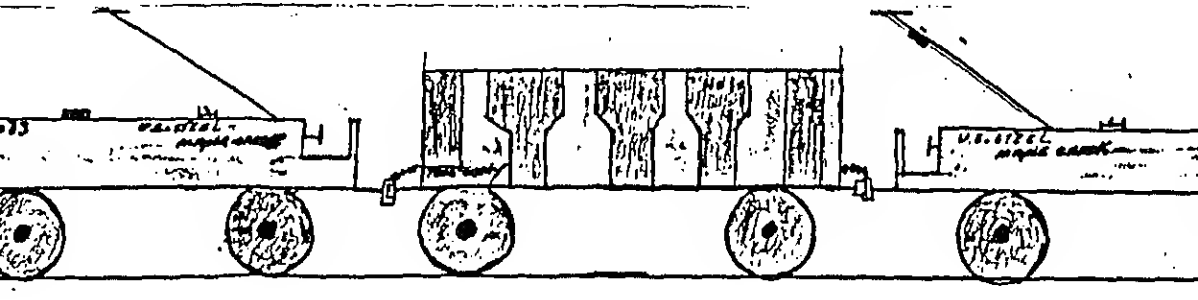
5. The chain had to be worked to uncouple. Depending he tightness of the links or the strength of the miner, or two hands were required to uncouple. Also, depending he size, skill, and strength of the miner, the percentage ody exposure between the cars would vary. A window in the onnel carrier wall, as shown in the drawings at page 3, d be used for access to the chain, in connecting or onnecting it, but personnel might also connect or disconnect chain from outside the cars.

6. MSHA did not approve use of the safety chains, which manually connected and disconnected by reaching in between cars.



Item 6 p. 1A

LENGTH 24 FT. 6 in HEIGHT 4 FT 7 IN WIDTH 6 FT



event the cars were moved. If miners reached in from the s
of the cars to connect or disconnect the chain, more of the
body was exposed to risk of injury.

8. In the mining industry, serious injuries and deaths
have occurred because miners were reaching in between cars t
couple or uncouple them when the train was inadverently move

9. Respondent did not use safety chains on non-personn
haulage cars. It used them on the personnel train because c
the risk of injury to passengers in the event of accidental
uncoupling of the personnel car. The grade in the mine was
average of about 2%, and ranged up to about 10%. The person
car had its own braking system, which could slow down the ca
but not bring it to a full stop in the event of an accidenta
uncoupling.

10. Since the first use of the chains at this mine, in
1959, there have been no reported injuries of miners who wer
connecting or disconnecting the safety chains.

Citation No. 1145239
Docket No. PENN 82-219

11. On March 31, 1982, Federal Inspector Alvin Shade i
to Respondent Citation No. 1145239, charging a violation of
CFR 75.1725(a), which provides:

> (a) Mobile and stationary equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

12. Inspector Shade issued the citation because contin
miner No. 7761 would not turn to the right. When the operat
tried to operate the right tram, the circuit breaker would t
de-energizing the whole machine. This condition had been ca
to Inspector Shade's attention by the continuous miner opera
who said the tram had not been working right for about two w

2 coal blocks from the face. The machine had been parked the around the beginning of the shift. They were tramming it to face, but when it would not tram right, they backed it up abo 50 feet and parked it. It was energized when Inspector Shade inspected it. Under his observation, they tried to tram it t the right and the circuit breaker tripped, de-energizing the machine.

14. Respondent had frequent problems with the tramming system on this machine from the time of its purchase, in 1980 The problem was the micro-switches in the tramming circuit. At times the circuit breaker would trip several times a shift There are about 12 micro-switches in the circuitry of the machine, and any one might fail at any time. Respondent made repeated efforts to have the manufacturer test the switches and supply reliable ones, but as of March 31, 1982, and even at the time of this hearing (December, 1982), no fully reliable equipment or maintenance program had been developed avoid this problem. On the day of the inspection and citatio a new micro-switch had been installed on the previous shift.

DISCUSSION WITH FURTHER FINDINGS

The Safety Chains

Respondent combines automatic couplers with safety chain on its personnel train. The couplers couple on impact; they are uncoupled by a hand-lever that MSHA has approved; the safety chains, to be connected or disconnected, require that an employee reach in between the ends of cars. MSHA has not approved the chains and charges a safety violation.

I conclude that Respondent's use of the safety chains violates the safety standard, 30 CFR 75.1405, which requires "automatice couplers which couple by impact and uncouple without the necessity of persons going between the ends [of the cars]." By adding safety chains, Respondent has modified its coupling system so that it cannot meet the requirements of the mandatory safety standard. Several cases have held a violation in similar circumstances. See, e.g., Pittsburgh Coal Company v. Secretary of Labor, 1 FMSHRC 1468 (1979); and Mathies Coal Company v. Secretary of Labor, 2 FMSHRC 1661 (Judge Melick, 1981).

chains. But this argument does not address other feasible m of supplementing automatic couplers on personnel cars, e.g., chains or wire ropes on the sides of cars, which would not violate § 75.1405. Moreover, it is addressed to the wrong forum. Petitions for modification of the application of a safety standard should be filed with the Labor Department, under section 101(c) of the Act.

I find that Respondent was negligent, in that the viola condition was known by Respondent and could have been preven by the exercise of reasonable care. I also find that this i a serious violation. There is a risk of serious injury or death in the event a person is handling the chain or reachin in between the cars when the train is inadvertently moved. Considering these factors, and Respondent's size, history of compliance and prompt, good-faith abatement of the violation I find that a civil penalty of $195 for this violation is appropriate.

The Continuous Miner

Inspector Shade testified that one of the dangers of operating the continuous miner with a defective tram was tha the operator could not move out of the way of roof-falls in retreat mining. With a defective micro-switch, when the operator tried to tram to the right the circuit breaker would trip, and the whole machine would be de-energized. This defective condition could endanger the operator. He could retain the protection of the canopy if he could tram t machine away from falling roof, but would probably be tempte to run if the machine would not move, thus exposing himself greater danger from the roof.

Moving equipment that cannot be steered properly is not in safe operating condition.

Respondent argues that MSHA cited a violation simply because Respondent could not guarantee that a new switch wou not fail, and the safety standard does not require that the operator guarantee that a repair will last for any specific

Respondent misconstrues the purpose and application of the safety standard. The standard requires that

backed up and left 2 blocks from the face. I find that the defective condition (inability to tram to the right and cau de-energizing of the whole machine by attempting to tram to right) was an "unsafe" operating condition. Respondent was required to remove the machine from service until the switc could be replaced or adjusted. This could have been done b de-energizing the machine and tagging it out of service pen repairs. However, Respondent left it parked and energized, that another machine operator might operate the machine in defective condition.

I find that Respondent was negligent, in that the unsa condition was known by Respondent and the violation could h been prevented by removing the machine from service pending repairs. This was a serious violation, because of the risk serious injury if the machine were operated with a defectiv tramming system. Considering these factors and Respondent' size, compliance history, and prompt, good-faith abatement the violation, I find that a civil penalty of $100 for this violation is appropriate.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties a the subject matter of the above proceedings.

2. Respondent violated 30 CFR 75.1405 as charged and ASSESSED a civil penalty of $195 for this violation.

3. Respondent violated 30 CFR 75.1725(a) as charged a is ASSESSED a civil penalty of $100 for this violation.

Proposed findings of fact or conclusions of law incons with the above are rejected.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above assessed civil penalties, in the amount of $295.00, w 30 days from the date of this decision.

William Fauver

RETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
INE SAFETY AND HEALTH	:	
DMINISTRATION (MSHA),	:	Docket No. HOPE 79-323-P
Petitioner	:	A.C. No. 46-05121-03008F
	:	
v.	:	Wayne Mine
	:	
EREY COAL COMPANY,	:	
Respondent	:	

DECISION GRANTING
SECRETARY'S MOTION TO AMEND
AND
DENYING RESPONDENT'S
MOTION TO DISMISS

re: Judge Fauver

The Secretary has moved (1) to amend his petition for ssment to include as a party respondent Frontier-Kemper tructors, Inc., an independent contractor, and (2) to Exhibit A of his petition for assessment to cite a ation of 30 CFR 77.1900-7 instead of 30 CFR 77-1900-1.

Part (2) of the motion is intended to correct a clerical r, and it conforms to the original § 107(a) imminent r order on which the petition is based. No prejudice result from allowing this technical amendment. dingly, part (2) of the Secretary's motion will be granted.

Respondent moves to dismiss this proceeding on the ground Respondent is not a proper party respondent. It also es the Secretary's motion to amend to include Frontier- er as a respondent.

Frontier-Kemper opposes the Secretary's motion to amend nclude it as a respondent, on the ground that the Commission no jurisdiction to include Frontier-Kemper because it was r issued a citation or order as the basis for this civil lty proceeding.

issued to Monterey in a § 107 imminent danger order on May 8, At that time it was the policy of MSHA to cite owner-operator such as Monterey for violations caused by the acts of indepen contractors. This policy was upheld in a number of court and Commission decisions. See, e.g., Bituminous Coal Operators Association v. Secretary of Interior, 547 F. 2d 240 (4th Cir. 1977); Cyprus Industrial Minerals Company v. FMSHRC, 664 F. 2 (9th Cir. 1981); Old Ben Coal Co., 1 FMSHRC 1480 (1979), aff' No. 79-2367, D.C. Cir., January 6, 1981; and U.S. Steel Corpo 4 FMSHRC 163 (1982).

In explaining the basis for its decision in the Old Ben case, the Commission stated in Phillips Uranium Corporation, 4 FMSHRC 549 (1982):

> In our decision in Old-Ben Coal Co., we emphasized that, although an owner-operator can be held responsible without fault for a violation of the Act committed by its contractor, the Secretary's decision to proceed against an owner for such a violation is not insulated from Commission review. 1 FMSHRC at 1483-1484. For the reasons stated in Old Ben we hold that the Commission may review the Secretary's decision in these cases to proceed against Phillips.
>
> The test applied by the Commission in reviewing the Secretary's choice is "whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purposes and policies of the 1977 Act." 1 FMSHRC at 1485. Our upholding of the Secretary's choice in Old-Ben, albeit with considerable doubts expressed as to the wisdom thereof, was largely based on the particular chronology of events in that case. The citation in Old Ben was issued only thirty-four days after the 1977 Mine Act had taken effect. 1 FMSHRC 1486 1486 n.7. Recognizing that responsibility for enforcement of the nation's mine safety program had only recently been transferred to the Department of Labor from the Department of Interior, we found that the Secretary's decision to cite Old Ben under an "interim" agency-wide policy to proceed only against owner-operators was, at least at that early stage, a

contractors may be cited for their own violations and in certain cases the "production-operator" may be cited instead of or in addition to the independent contractor. 45 Fed. Reg. 44494-44498.

The facts in the present case place them fundamentally in the same light as the Old Ben case. The order was issued to Monterey less than 2 months after the effective date of the 1977 Mine Act. In line with the Commission's holding in Old-Ben, I find that the Secretary's decision to cite Monterey under an "interim" agency-wide policy to proceed only against owner-operators was, at least at that early date, "a decision not inconsistent with the purposes and policies of the 1977 Act." Accordingly, Monterey's motion to dismiss should be denied.

Considering the long stay of this proceeding pending Monterey's appeals on the issue whether Montercy is a proper party, I find that the Secretary's motion to join the independ contractor as a respondent is not barred by estoppel and is no prejudicial to either Monterey or Frontier-Kemper. Both companies are presumed to have been aware of the specific char and factal contentions in the § 107 order since its issuance i May 1978. First, the order was issued to Monterey, and in its answer to the petition for assessment of civil penalties, Monterey alleged that if there was a violation it was committe by Frontier-Kempler as an independent contractor. Second, the close contractual relationship between Monterey and Frontier-Kemper warrants thc presumption that Frontier-Kempler has been notice, since May 1978, that is contract performance in May 19 is the subject of the MSHA charges against Monterey.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Secretary's motion to amend is GRANTED and he sha have 15 days from this decision to file the amendments to his petition.

2. Monterey's motion to dismiss is DENIED.

William Fauver

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